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APPENDIX

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-161

ELLIOT L. RICHARDSON, *Secretary of Health, Education and Welfare, Appellant*

v.

RADIE WRIGHT, *et al.*

No. 70-5211

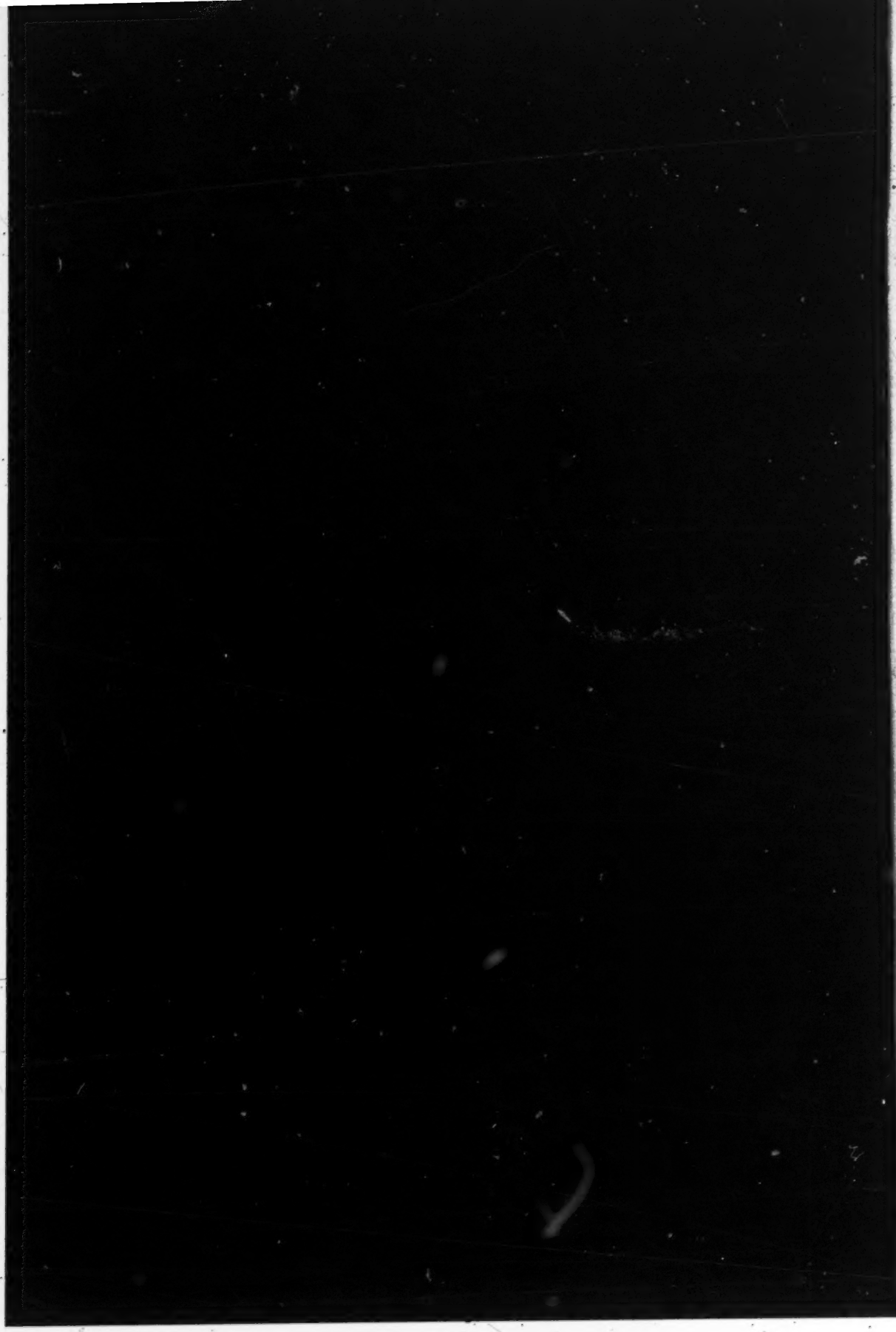
RADIE WRIGHT, *et al., Appellants*

v.

ELLIOT L. RICHARDSON, *Secretary of Health, Education and Welfare*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FILED MAY 10 AND 11, 1971
PROBABLE JURISDICTION NOTED OCTOBER 12, 1971



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Relevant Docket Entries

No. 1457-70 in the United States District Court for the District of Columbia

Date	Filings—Proceedings
1970	
May 13	Complaint seeking declaratory and injunctive relief and requesting a three-judge court, with attachments, filed
	Motion for leave to file in forma pauperis, with affidavit and points and authorities, filed
	Motion for leave to file in forma pauperis granted by McGuire, J.
	Motions for temporary restraining order and preliminary injunction, with affidavit, points and authorities, and attachments, filed
	Motion for convening a three-judge court, with points and authorities, filed
	Motion for certification of action as maintainable as a class action, with points and authorities, filed
May 14	Temporary restraining order entered by Gasch, J.
May 18	Affidavit of Paul Merlin filed
June 16	Defendant's opposition to motions for preliminary injunction and for convening a three-judge court and defendant's motion to dismiss or for summary judgment, with statement of material facts, affidavit, and points and authorities, filed
June 25	Plaintiff's reply to defendant's opposition, plaintiff's opposition to defendant's motion to dismiss, and plaintiff's cross-motion for summary judgment, with statement of mate-

Date	Filings—Proceedings
1970	
	rial facts, opposition to defendant's statement of material facts, affidavits, and points and authorities, filed
June 30	Request by Gasch, J. to the Chief Judge, United States Court of Appeals, for the designation of a panel of three judges
July 2	Designation by Wright, Acting Chief Judge, United States Court of Appeals, of Robb, C.J., Matthews, Sen. D.J., and Gasch, D.J. as the panel to hear and determine the matter
July 17	Motion of John Dillard Atkins, Jr. for leave to intervene as party plaintiff, with points and authorities, complaint, attachments and affidavits, filed
August 20	Defendant's opposition to motion for leave to intervene and to plaintiff's motion for certification of action as maintainable as a class action, filed
August 21	Order of Gasch, J. granting motion for leave to intervene as party plaintiff and motion for certification of action as maintainable as a class action
August 24	Affidavit of Bernard Popick, in support of defendant's opposition, filed
August 25	Hearing conducted before Robb, C.J., Matthews, Sen. D.J., and Gasch, D.J.; action taken under advisement
1971	
January 6	Opinion by Gasch, D.J., concurred in by Robb, C.J., and dissented to in part by Matthews, Sen. D.J.
February 12	Order of Gasch, J. declaring 42 U.S.C. 425 unconstitutional, prohibiting the suspension without adequate notice and opportunity to

Date	Filings—Proceedings
1971	
	participate in the determination proceedings of the disability benefits of any social security beneficiary, including plaintiff, and granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment
March 1	Defendant's motion for a stay pending appeal, with points and authorities, filed
March 10	Plaintiff's opposition to motion for a stay pending appeal, with points and authorities, filed
March 12	Plaintiff's and intervenor plaintiff's notice of appeal from order of February 12, 1971, filed
	Defendant's notice of appeal from order of February 12, 1971, filed
March 24	Order of Robb, C.J., Matthews, Sen. D.J., and Gasch, D.J. staying order of February 12, 1971 pending appeal on the condition that plaintiff continue to receive social security disability benefits until his eligibility is suspended in accordance with the procedures outlined in the January 6, 1971 opinion
	No. 70-161 in the United States Supreme Court
1971	
May 11	Appellant Richardson's jurisdictional statement filed
October 12	Order of Court noting probable jurisdiction and consolidating the case with No. 70-5211
	No. 70-5211 in the United States Supreme Court
1971	
May 10	Appellant Wright's and intervenor appellant Atkins' jurisdictional statement, with

Date	Filings—Proceedings
1971	
	motion for leave to proceed in forma pauperis, filed
June 11	Appellee Richardson's memorandum in response filed
June 17	Appellants' response to appellee's memorandum filed
October 12	Order of Court noting probable jurisdiction, granting appellants leave to proceed in forma pauperis, and consolidating the case with No. 70-161

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RADIE P. WRIGHT and CLARA LITTLE WRIGHT, on their own behalf and as next of friend to their infant child CLARENCE EDWARD, and on behalf of all others similarly situated, *Plaintiffs,*	Civil Action No.
v.	
ROBERT H. FINCH, individually and in his capacity as Secretary of Health, Education and Welfare, *Defendant.*	

COMPLAINT

(Request for Three-Judge Court)

I

This is an action seeking declaratory injunctive relief to protect plaintiffs' rights under Title II of the Social Security Act, 42 U.S.C. Secs. 401 *et seq.*, and regulations promulgated thereunder, and the due process clause of the Fifth Amendment to the United States Constitution. This action arises under the Constitution and laws of the United Sates, including the Fifth Amendment to the Constitution and 42 U.S.C. Secs. 402(d) and 423.

II

Jurisdiction of this court is invoked pursuant to 11 D.C. Code, Section 521 (1967 ed.) and to 28 U.S.C., Section 1331, 1343(4), 1361, 2201, 2282, and 2284. The amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

III

This is an appropriate case for the convening of a three-

judge court, pursuant to 28 U.S.C. Secs. 2282 and 2284, in that plaintiffs seek an injunction against the enforcement, operation and execution of Acts of Congress, 42 U.S.C. Secs. 425, 405(b), 421(a) and 421(d) (a copy of which is attached hereto as Exhibit A), insofar as these statutes authorize or require suspension on termination of financial benefits prior to granting adequate notice and opportunity to be heard, on grounds of their repugnance to the due process clause of the Fifth Amendment of the Constitution of the United States.

IV

This action seeks an injunction and declaratory judgment declaring unconstitutional and restraining the enforcement of the aforesaid Acts of Congress, on their face and as applied and interpreted by defendant, on the grounds that said statutes, and actions taken pursuant thereto, deny to plaintiffs due process of law guaranteed by the Fifth Amendment to the United States Constitution, in that said statutes deny to plaintiffs reasonable and adequate notice of the grounds of termination of their Disability Insurance benefits, and deny to plaintiffs an opportunity for a fair and proper evidentiary hearing prior to the termination of their Disability Insurance benefits.

V

Plaintiff Radie Wright is an adult citizen of the United States and has been a resident of the District of Columbia since 1950. Plaintiff Clara Little Wright has been married to plaintiff Radie Wright for 21 years. Plaintiff Clarence Edward Wright, age 17, is the minor child of Radie and Clara Wright and has lived with them at their residence located at 1249 Half Street, S.W., Washington, D.C.

Plaintiff Radie Wright has a history of physical disability including portal cirrhosis, osteroarithritis of the knees, gastritis with Laennec's cirrhosis, hypercholesterol anemia, decompensated cirrhosis, pancreatic hermatemsis and hepatic decompensation. He applied for Social Security and in May 1966 on the basis of a determination, pursuant to 42 U.S.C. Sec. 423(d)(1)(A), of his "inability to engage in any substantial gainful activity by reason of (a) medically determinable physical or mental impairment which

can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months" defendant commenced payments for the benefit of plaintiff Radie Wright and his wife and children.

VII

Plaintiffs are members of a class in which all members have been found entitled to receive Old Age, Survivors, and Disability Insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-429. All of the members of this class face peremptory, *ex parte* termination of their payments upon any administrative determinations of ineligibility prior to being afforded an opportunity for an evidentiary hearing. The authority to terminate payment and then grant an opportunity for a hearing is granted by 42 U.S.C. §§ 405(b), 421(a), and 421(d), and is in violation of rights guaranteed under the Due Process Clause of the Fifth Amendment. A substantial portion of this class, including the named plaintiffs face peremptory, *ex parte* suspension of benefits if the defendant believes they "may have ceased to be under a disability", pending his determination of whether "disability has ceased or until the Secretary believes that such disability has not ceased" as authorized by 42 U.S.C. Sec. 425. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all persons constituting the above class who are similarly situated. The persons in the class are so numerous that joinder of all members is impractical; there are questions of law or fact common to the class; the claims of the representative parties are typical of the class; and the representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class; adjudications with respect to individual members of the class would, as a practical matter, be dispositive of other members not parties to the adjudications; the questions of law and fact common to the members of the class predominate over any questions affecting only individual members; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

VIII

Defendant Robert Finch is the Secretary of Health, Education and Welfare and, as such, is charged with the administration of Title II of the Social Security Act, 42 U.S.C. Secs. 401 *et seq.*; and in particular with the determination of entitlement to benefits on the basis of disability pursuant to 42 U.S.C. Secs. 402(d) and 423.

IX

Title II of the Social Security Act, 42 U.S.C. Sec. 401 *et seq.*, creates a program of Disability Insurance under which individuals who have accumulated certain quarters of coverage and suffer a totally disabling impairment of enduring character become thereby entitled to earning-replacement benefit payments for themselves and their dependents. Persons who meet the statutory criteria, as interpreted in the Department of Health, Education and Welfare regulations, receive Disability Insurance payments as a matter of statutory entitlement.

X

Plaintiff Radie Wright began full-time work at age 14 and, for the most part, maintained gainful employment as a heavy and unskilled laborer. His last place of employment was with the Magnus and Lawson Construction Co., Colesville Rd., Silver Spring, Md., in 1965.

XI

Plaintiff Radie Wright left his position with Magnus and Lawson Construction Co. in 1965 because of a severe hemorrhage which led to immediate hospitalization for approximately five weeks. During that time, he was treated for a GI hemorrhage, chronic gastritis with Laennec's cirrhosis, hepatic decompensation and possible pancreatitis. Plaintiff left the hospital on October 20, 1965 and has continued medical treatment at the medical clinic at Freedman's Hospital on a regular basis, making visits twice a month. Due to his physical condition at that time, it was impossible for him to continue employment as an unskilled laborer. In early 1966, plaintiff made application for Social Security Disability benefits on behalf of himself and his family. His application was accepted in May 1966.

XII

Plaintiff Radie Wright received monthly Social Security payments in the amount of $97.40 per month, for the support of himself with additional payments for his wife and children, commencing in May 1966 until February 1968, when his allowance was raised by statutory amendment to $110.10 per month. Plaintiff Radie Wright continued to receive Social Security payments in the amount of $110.10 per month until December 1969 when, because of a statutory amendment, he began receiving $126.70 per month, said amount continuing until termination by preemptory, *ex parte* action of the Defendant Secretary on April 14, 1970. Plaintiff Radie Wright received a letter (attached hereto as Exhibit B) dated April 14, 1970, which informed him in pertinent part as follows:

> Your benefit payments have been stopped because your trial work period expired. *We are withholding further payments until we can study the facts and decide whether you still meet the requirements for disability benefits.* We will let you know when this decision has been made and will tell you then whether payment can be started again. (Emphasis supplied)

XIII

By letter of his attorney (attached hereto as Exhibit C), dated April 10, 1970, plaintiff Radie Wright requested a hearing on the merits of his claim to disability benefits *prior to* any suspension or termination of his payments, stating, in pertinent part that:

> I represent Mr. Radie Wright in his efforts to prevent the suspension or termination of his Social Security disability pension without first having a hearing on the merits of his claims that he is entitled to continue to receive Social Security Disability benefits.
> . . . Mr. Wright was informed (by the Social Security Administration) that there was a strong likelihood that future checks would not be forthcoming because of the possibility that his previous employments may have disqualified him for benefits.
> Mr. Wright is unemployed and relies upon his disability benefits to support himself, his wife, and two

sons. Therefore, cessation of his pension would cause immediate dire financial difficulties and extreme hardship for himself and his family.

It is clear that if a suspension or termination occurs under these circumstances, Mr. Wright and his family will be compelled to suffer great hardship by having their sole source of income cut off without a prior hearing, with counsel, and the right to present evidence to support his position.

Therefore, I urge you to grant my client a hearing on the merits of his claim to disability benefits prior to any suspension or termination of his payments. Please let me know, by return mail, whether or not Mr. Wright will be sent a disability check during the first week of May, 1970. If Mr. Wright will not be sent his May check, please let me know, by return mail, when and where we can hold a hearing on the merits of his claim. This hearing must be scheduled far enough in advance to enable me to properly prepare Mr. Wright's position, and, clearly, it must be prior to the end of April.

On April 17, 1970 plaintiff received a letter from the Social Security Administration notifying him that his benefit payments have been stopped pending an *ex parte* determination and investigation so that "we (Social Security Administration) can study the facts and decide whether you still meet the requirements for disability benefits" (Exhibit B attached hereto). Plaintiff has as yet received no response to his letter of April 10, 1970 requesting a hearing prior to termination.

XIV

Plaintiff Radie Wright knows of no medical evidence which would establish his ability to work, and in fact, is medically unable to maintain gainful employment at this time. His doctors have advised him not to undertake regular employment. Mr. Wright obtains treatments at Freedman's Hospital in Washington, D.C. twice each month and takes several prescribed medications daily. A report of his medical condition prepared by the hospital on April 20, 1970 (attached hereto as Exhibit D) indicates that plaintiff suffers from, among other conditions, hyperten-

sion, abnormal cirrhosis of the liver, abnormal liver function, hepatomegaly and swollen liver. The medical report also states that Mr. Wright's major disability cannot be removed by treatment.

XV

Plaintiff Radie Wright, due to his state of health, is presently unable to maintain gainful employment and provide support for himself and his family. Accordingly, because of the loss of Social Security income, plaintiffs will suffer mental anguish and immediate, continuing and irreparable injury to their health.

XVI

Defendant's preemptory, *ex parte* action suspending or terminating plaintiffs' Social Security Disability Insurance benefits violates the Due Process Clause of the Fifth Amendment to the United States Constitution in that it effectively suspended or terminated and withholds benefits essential to life itself without affording plaintiff Radie Wright reasonable and adequate notice as well as an opportunity for a prior fair hearing.

XVII

Sections 405(b), 421(a), 421(d) and 425 of the Social Security Act 42 U.S.C. Sec. 405(b), 421(a), 421(d) and 425 are invalid and repugnant to the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as they authorize or require the defendant Secretary to take preemptory, *ex parte* action suspending or terminating benefits without affording reasonable and adequate notice and an opportunity for a prior fair hearing.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Assume jurisdiction of this case;

2. Convene a three-judge Court to hear this cause;

3. Enter a Temporary Restraining Order and a Preliminary and Permanent Injunction (A) restraining the operation and enforcement of 42 U.S.C. Secs. 405(b), 421(a), 421(d) and 425 insofar as they authorize or require the defendant Secretary to put into effect the suspension or termination of Social Security Disability Insurance benefits to plaintiffs, and (B) requiring the defendant Secretary

to restore and continue benefit payments to plaintiffs until notice and opportunity for a hearing meeting Due Process standards are afforded;

4. Declare that 42 U.S.C. Secs. 405(b), 421(a), 421(d) and 425 are invalid as repugnant to the Due Process required by the United States Constitution insofar as they authorize or require termination of Social Security Disability Insurance benefits payments without adequate notice and prior opportunity for a fair hearing.

5. Certify plaintiffs and those who are similarly situated as a class, pursuant to Rule 23 of the Federal Rules of Civil Procedure in respect to all rights and liabilities involved in this action.

6. Declare the other rights and relations of the parties hereto;

7. Award Costs to plaintiffs; and

8. Enter such other and further relief as the Court may deem just and appropriate.

/s/ Leona Yurdin
LEONA YURDIN
36 N Street, S.E.
Washington, D.C.
544-5000

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC
36 N Street, S.E.
Washington, D.C.
544-5000

/s/ Edward E. Schwab
EDWARD E. SCHWAB
4300 Deane Avenue, N.E.
Washington, D.C.
397-4310

Attorneys for Plaintiffs

SUBSCRIBED AND SWORN to before me this 7th day of May 1970.

/s/ Frank L. Eccles
Notary Public, D. C.
My Commission Expires Dec. 31, 1972

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21241

Give Claim No. 578-56-2424HA
When Writing About Your Claim To:
Social Security Office
414 11th Street, N.W.
Washington, D.C. 20203
April 14, 1970

Radie P. Wright
1249 Half Street, Southwest
Washington, D.C. 20024

Your benefit payments have been stopped because your trial work period expired . We are withholding further payments until we can study the facts and decide whether you still meet the requirements for disability benefits. We will let you know when this decision has been made and will tell you then whether payments can be started again.

In the meantime, if you have any questions about your claim, please get in touch with your social security office. If you call in person, please take this notice with you.

Sincerely yours,

/s/ C. C. Hall
C. C. HALL

Assistant Director Bureau of Disability Insurance

April 10, 1970

Mr. Bernard Popick
Director
Bureau of Disability Insurance
Post Office Box 1075
Baltimore, Maryland 21203

Re: Mr. Radie Wright
Social Security No. 578-56-2424

Dear Mr. Popick:

I represent Mr. Radie Wright in his efforts to prevent the suspension or termination of his Social Security disability pension without first having a hearing on the merits of his claim that he is entitled to continue to receive Social Security disability benefits.

In May, 1966, Mr. Wright began to receive monthly disability pension checks. In February, 1970, Mr. Wright complied with a request of the Social Security Administration and participated in an interview with Miss Karen Salvatore, a claims representative. At that meeting Mr. Wright was asked to describe the sources and amounts of any earnings he had received since the start of his disability allowance. Mr. Wright was informed that there was a strong likelihood that future checks would not be forthcoming because of the possibility that his previous employments may have disqualified him for benefits.

Mr. Wright is unemployed and relies upon his disability benefits to support himself, his wife, and two sons. Therefore, cessation of his pension would cause immediate dire financial difficulties and extreme hardship for himself and his family.

Through several telephone conversations with Miss Salvatore, a claims representative of the Social Security Administration, and with Mrs. Melba Lyons of your office, I have learned that Mr. Wright's disability status is under examination by the Continuing Investigation Unit of the Bureau of Disability Insurance. I have also learned that it is most probable that Mr. Wright will not receive his benefit check for May, 1970, because, before May the Bureau of Disability Insurance will either have made an initial

determination to terminate his benefits or will have suspended his benefits pending the issuance of an initial determination, either event preventing Mr. Wright's check from being sent to him.

It is clear that if a suspension or termination occurs under these circumstances, Mr. Wright and his family will be compelled to suffer great hardship by having their sole source of income cut off without a prior hearing, with counsel and the right to present evidence to support his position.

Therefore, I urge you to grant my client a hearing on the merits of his claim to disability benefits *prior to* any suspension or termination of his payments. Please let me know, by return mail, whether or not Mr. Wright will be sent a disability check during the first week of May, 1970. If Mr. Wright will not be sent his May check, please let me know, by return mail, when and where we can hold a hearing on the merits of his claim. This hearing must be scheduled far enough in advance to enable me to properly prepare Mr. Wright's position, and, clearly, it must be prior to the end of April.

Sincerely yours,

LY/ld

/s/ Leona Yurdin

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF PUBLIC WELFARE
MEDICAL ELIGIBILITY DIVISION

MED

MEDICAL EXAMINATION REPORT

Appointment: Date / Hour	Name: Tulright, P Lodie Address: 1249 2 ST S.W.
	Birthdate: 3/3/23 · Sex: M/F · Race: W/N/O · No. in Family
SD Social Service Representative: O. C Comra · Date: 11/20/	DC ID NO: 00[illegible] · Family: 01 · IND: 479 · Prog.

Reason for Referral: To determine degree of disability, diagnosis, prognosis & feasibility for rehabilitation

PHYSICAL EXAMINATION REPORT - (To be filled out by physician)

Diagnosis: (Indicate major and minor) 1. Hypertension
2. Gallstones
3. Cirrhosis of liver

Treatment: (Past and current) Aldactone
Diet
Digoxin
Multivitamin

Objective Findings: (Give report of X-rays, EKG's laboratory or other diagnostic tests, with dates. Use separate sheet if necessary)

Abnormal liver function
Hepatomegaly
Swollen knees

W-MED 208
ev Feb. 66

(OVER)

Characteristics of Major Disability: (Check appropriate items) Permanent.....
Temporary.....Stable.X..Slowly progressive.....
Improving.....

Can the Major Disability Be Moved By Treatment: ☐ Yes ☒ No

If yes, anticipated duration.....

Substantially Reduced By Treatment: ☒? Yes ☐ No

If yes, anticipated duration.....

Physical Capacities: (Under "Physical Activities" and "Working conditions" use symbols as follows:

(✓) No Limitation. (X) Limitation. (O) To be avoided.

Physical activities: Walking..X..Standing..X..Stooping..X..Kneeling..X..Lifting..X..
Reaching..X..Pushing..X..Pulling..X..Other(Specify).....

Working conditions: Outside..X..Inside..✓..Humid.....Dry..✓..Dusty..X..
Sudden temperature changes..X..Other(Specify).....

RECOMMENDATIONS:

☐ Hospitalization (Specify reasons and approximate duration).....

☐ Treatment (Specify type and approximate duration).....

☐ Special Facility (Specify personal care, nursing care, constant protective supervision).....

.....

REMARKS:

I hereby give consent for this information to be used with permission of the applicant, by the Public Assistance Division as needed in connection with its rehabilitative services to the applicant.

Freedmen's — Emmett Williams
(Printed or Typed Name of Physician or Organization) Signature

601 Bryant NW — 4-22-76
Address Date

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Radie Wright, being first duly sworn, depose and say that I am the plaintiff in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress, and that the issues which I desire to present are fully set forth in the motions for temporary restraining order and preliminary injunction and affidavits and memorandum in support thereof.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of this proceeding are true.

1. Are you presently employed?

I am not presently employed because I am physically disabled and am unable to hold a regular job.

From the last quarter of 1968 through December 1969 I was employed by the Shayne Brothers Corporation, 1401 W Street, N.E., Washington, D.C. My work for Shayne Brothers involved handling dead animals. I earned approximately $3,330.41. From October 1969 through December 1969 I also worked as a laborer for the Frank B. Joy Company, 817 Bunker Hill Road, N.E., Washington, D.C., and earned approximately $1,015.40. I have had no employment since December 1969. My last employment prior to the start of my work for the Shayne Brothers was in 1965 when I worked as a laborer for Magnus Lawson Corporation, Colesville Road, Silver Spring, Maryland.

2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

During the past twelve months I have been receiving Social Security Disability benefits. I have been receiving Disability benefits since 1966. From May 1966 through January 1968 my benefits were $97.40 per month. Because of my eligibility for Disability Insurance benefits, in May 1966 my son Radie Wright, Jr. began to receive Disability

Insurance benefits of $45.40 per month. I was payee for these payments. In January 1967 my wife Clara Little Wright also became entitled to Disability Insurance benefits because of my condition. Her benefits were $30.20 each month. Her entitlement caused Radie Jr.'s benefits to be reduced to $30.20 per month. In February 1968 as a result of statutory amendments, my payments were increased to $110.10 per month. Likewise, in February 1968 Radie Jr.'s and my wife's payments both became $34.20 each month. In May 1968 Mrs. Wright's and Radie Jr.'s benefits were terminated because he became 18 years old and was no longer in school.

In August 1966, along with Radie Jr.'s and my application for benefits, I also applied for benefits for my son Clarence Edward Wright. I never received payments as payee for him. Instead, the District of Columbia Department of Public Welfare became payee for him and received $55.10 per month effective May 1966 through December 1966. In January 1967, because of Mrs. Wright's entitlement, his payments were reduced to $34.20. The Social Security Administration later found that Mrs. Wright had received an overpayment for a period of one month when Radie Jr. was not living at home.

In March 1970, effective January 1970, as a result of further statutory changes my monthly check was increased to $127.70 and Clarence's benefits, which were still being paid to the Department of Public Welfare, were raised to $63.40 per month. On April 18, 1970 I received a letter from the Social Security Administration notifying me that in the future I would not receive benefit checks because the Social Security Administration has determined that I have exhausted my trial work period and that they are continuing to consider whether or not I still meet the requirements for Disability benefits.

3. Do you own any cash or checking or savings account?

I own no cash, checking or savings account.

4. Do you own any real estate, stocks, bonds, notes, automobile, or other valuable property (excluding ordinary household furnishings and clothing)?

I own no real estate, stocks, bonds, notes, automobile or other valuable property.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Dependent upon me for support are my wife, age 44, and my two sons, ages 17 and 19.

6. Out of my monthly disability benefits I also pay each month $33.00 for rent, approximately $44.00 for food stamps, approximately $20.00 for household supplies, approximately $20.00 for cleaning, laundry, hair cuts and clothing, and approximately $4.00 for transportation for myself and my wife for our clinic treatments and other needs.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

/s/ Radie P. Wright
RADIE P. WRIGHT

SUBSCRIBED AND SWORN TO BEFORE me this 7th day of May 1970.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Judge

/s/ Frank L. Eccles
Notary Public, D.C.
My Commission Expires Dec. 31, 1972

MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs Radie P. Wright and Clarence Edward Wright move this Court for a temporary restraining order preventing the defendant Secretary from enforcing the provisions of 42 U.S.C. Sections 425, 405(b), 421(a) and 421(d) insofar as they authorize or require the defendant Secretary to suspend or terminate their receipt of monthly Disability Insurance benefits of $127.70 and $63.40, respectively, without first having afforded them an opportunity for an evidentiary hearing meeting the standards of Due Process of law on the merits of their claims to continued entitlement, pending a hearing and final determination of plaintiffs' motion for a preliminary injunction.

The grounds for this motion are that dire, immediate and irreparable injuries, losses and damages will result to the plaintiffs Radie P. Wright and Clarence Edward Wright, because of their losses of their sole sources of income, if the defendant Secretary is not enjoined from effectuating the suspension of their monthly Disability Insurance benefits of $127.70 and $63.40, respectively, before they have had an opportunity to have a Due Process hearing, as fully set forth in the verified complaint, motion for a preliminary injunction and affidavit and memorandum in support thereof, all of which are attached hereto and made a part hereof.

/s/ Leona Yurdin
LEONA YURDIN
36 N Street, S.E.
Washington, D.C. 20003
LIncoln 4-5000

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC
36 N Street, S.E.
Washington, D.C. 20003
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/s/ Edward E. Schwab
EDWARD E. SCHWAB
4800 Deane Avenue, N.E.
Washington, D.C. 20019
399-4310

MOTION FOR PRELIMINARY INJUNCTION

Pending the full hearing and determination of this action, plaintiffs move this Court for a preliminary injunction:

1. Enjoining the defendant Secretary from enforcing the provisions of 42 U.S.C. Sections 425, 405(b), 421(a) and 421(d) insofar as they authorize or require the defendant Secretary to suspend or to terminate the payments of Old Age, Survivors and Disability Insurance benefits to recipients who have been found entitled to such benefits pursuant to 42 U.S.C. Sections 401 through 429, without the defendant Secretary having first afforded them opportunities for evidentiary hearings meeting the standards of Due Process of law;

2. And for a further order requiring the defendant Secretary to restore and continue benefit payments to all recipients of Old Age, Survivors and Disability Insurance benefits until the conclusions of evidentiary Due Process hearings on the merits of their claims to continued entitlements.

This motion is made on the grounds that before a full hearing can be held and without a preliminary injunction against the defendant secretary's enforcement of 42 U.S.C. Sections 425, 405(b), 421(a) and 421(d) and without an order restoring benefit payments to plaintiffs Radie P. Wright and Clarence Edward Wright, and all others in their class, plaintiffs will suffer irreparable injury because of their losses of their sources of income, as fully set forth in the complaint, affidavit and memorandum in support of this motion and their motion for a temporary restraining order, motion for certification as a class action and memorandum in support thereof, all attached hereto and made a part hereof.

Although this action has not yet been certified as a class action, it has been filed as such and, as shown in the attached motion for certification as a class action and memorandum in support thereof, this action meets all the requisites of a class action under Rule 23 of the Federal Rules of Civil Procedure. Since it is most likely this action will be certified as a class action, it is at this time appropriate to

grant the requested, injunctive relief for all members of the class.

/s/ Leona Yurdin
LEONA YURDIN
36 N Street, S.E.
Washington, D.C. 20003
LIncoln 4-5000

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC
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/s/ Edward E. Schwab
EDWARD E. SCHWAB
4800 Deane Avenue, N.E.
Washington, D.C. 20019
399-4310

Attorneys for Plaintiffs

AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, Radie Wright having been duly sworn depose and say:

1. I am an adult citizen of the United States and have been a resident of the District of Columbia since 1950. I am 47 years old and have been married to my wife Clara Little Wright since 1950.

2. We are the natural parents of two sons, Radie Wright, Jr. age 19 and Clarence Edward Wright, age 17. We reside at 1249 Half Street, S.W. and have lived there for the past 5½ years. I have completed the second grade in public school in Wadesboro, North Carolina.

3. I began full-time employment as a railroad construction worker in Wadesboro, North Carolina when I was approximately 14 years old. From that time until I became physically disabled in the fall of 1965 I worked as a laborer primarily carrying heavy objects or pushing heavy loads.

From about 1958 until the fall of 1965, when I became disabled, I worked for the Magnus Lawson Construction Company of 8634 Colesville Road, Silver Spring, Maryland. My job involved carrying bricks and operating a cement mixer.

4. In the fall of 1965 I suffered a hemorrhage and was admitted to Freedman's Hospital, in the District of Columbia. I was hospitalized for about five weeks and was warned by my doctors not to attempt to resume employment. Since that time I have been regularly receiving treatments at the Freedman's Hospital out-patient clinic.

5. Because of my poor health and upon the recommendations of my doctors I was compelled to stop working. Therefore in 1965 my wife was forced to obtain Public Assistance for myself and our family. My wife's check was approximately $147.00 per month. However, in May 1966, to remove us from Public Assistance, I began to receive Social Security benefits for myself and as payee for my son Radie Wright, Jr.

From May 1966 through January 1968 my benefits were $97.40 per month. My son Radie Jr.'s benefits were $45.30 during that period. Because of my disability and because Radie Jr. was living at home, in January 1967 my wife

began to receive Disability Insurance benefits of $30.20 per month. Her entitlement caused Radie Jr.'s benefits to be reduced to $30.20 per month.

As a result of statutory amendments in February 1968 my payments were increased to $110.10 per month and Radie Jr.'s and my wife's benefits rose to $34.20 each month. In May 1968 Radie Jr.'s and Mrs. Wright's benefits were terminated because he became 18 years old and was no longer living at home.

In August 1966, along with Radie Jr.'s and my applications for benefits, I also applied for benefits for my son Clarence Edward Wright. I never was payee for these benefits. Instead, the District of Columbia Department of Public Welfare became payee for him and effective from May 1966 received $55.10 per month until February 1968 when his benefits were reduced to $34.20 per month, because of Mrs. Wright's entitlement. The Social Security Administration later found that Mrs. Wright had received an overpayment for a period of one month when Radie Jr. was not living at home.

In March 1970, effective January 1970, as a result of further statutory changes my monthly check was increased to $127.70 and Clarence's benefits, which were still being paid to the Department of Public Welfare, rose to $63.40 per month.

6. I am presently unable to hold a regular job. My physical disabilities include hypertension, cirrhosis of the liver, abnormal liver function, swollen liver and hepatomegaly. I visit the Freedman's Hospital Clinic twice per month and receive extensive physical examinations. In addition, I take several medications daily. My doctors have continued to advise me not to work. My medical reports indicate that my disability will not be substantially reduced by treatment.

7. Despite my disabilities and while enduring great physical discomfort, to better provide for myself and my family I began working for the Shayne Brothers Corporation, 1401 W Street, N.E., Washington, D.C. In 1968 I earned $248.32 from Shayne Brothers. During the first quarter of 1969 I earned approximately $1,067.17 doing work for them. From April through June 1969 I earned from Shayne Brothers another $1,064.20. I continued to work for Shayne Brothers and earned approximately $789.48 from July through September 1969, and $162.24 from October through

December 1969. Therefore, my total earnings from Shayne Brothers has been approximately $3,330.41. In the last quarter of 1969 I also began to do janitorial work, primarily shoveling dirt, for the Frank B. Joy Company, 817 Bunker Hill Road, N.E., Washington, D.C. and earned approximately $1,015.40 during that period.

I have been unemployed since December 1969 and rely solely upon my Social Security Disability Insurance benefits to support myself and my family.

8. In early February 1970 in compliance with a request of the Social Security Administration I was interviewed by a claims representative concerning my presently disabled condition. The claims representative, among other things, asked me whether or not I had worked during 1968 and 1969, and if so, what was the nature of my employment and the amount of my earnings. I responded that I had worked from March 1968 through October 1969 as a laborer for Shayne Brothers Corporation and that from October 1969 through December 1969 I worked for Frank B. Joy Company as a sweeper. I was told by the claims representative that because of my earning my and my son's rights to receive disability benefits were being investigated by the Social Security Administration. The claims representative further stated that there was a very great likelihood we would not receive disability benefits in the future.

9. On April 18, 1970 I received a letter from the Social Security Administration notifying me that in the future I would not receive benefit checks because the Social Security Administration has determined that I have exhausted my trial work period and that it is continuing to consider whether or not I still meet the requirements for disability benefits.

10. Since my poor physical condition continues to prevent me from engaging in regular employment, I believe my family and I are entitled to continue receiving disability benefits. If my past employments have caused any overpayments, I believe we should have an opportunity to present our claims and determine what, if any, monies should be returned to the Social Security Administration. At a hearing we might also arrange a gradual repayment schedule that would enable my family and me to maintain our source of income during the repayment period. It is unfair to completely terminate our only means of livelihood with-

out a fair hearing and an opportunity to achieve a reasonable adjustment.

11. Furthermore, if my family's and my benefits are ended without a hearing, we will be greatly disadvantaged in any later efforts to obtain a review of the decision to suspend or terminate. Since our disability payments are our only sources of support, after cessation of benefits we will be forced to devote our energies to finding other means of subsistence. Therefore we will be unable to give proper attention to pressing our claims on their merits. Even if we later pursue a reconsideration of the termination, in the interim we will have suffered great and irreparable harm flowing from lack of money to buy the necessaries of life. A later hearing will not provide adequate compensation for these injuries.

/s/ Radie P. Wright
RADIE P. WRIGHT

SUBSCRIBED AND SWORN TO before me this 7th day of May 1970.

/s/ Frank L. Eccles
Notary Public

My Commission Expires: 12/31/72

[*Title Omitted in Printing*]

APPLICATION FOR CONVENING COURT OF THREE JUDGES

Plaintiffs, upon their complaint filed herewith, hereby make application for hearing of this cause for preliminary and permanent injunctive relief and for a declaratory judgment that Title 42, Sections 405(b), 421(a), 421(d) and 425 are repugnant to the Constitution of the United States insofar as they authorize or require the Secretary of Health, Education, and Welfare to terminate or suspend plaintiffs' Social Security payments prior to affording them an opportunity for a hearing on contested matters of fact or on the application of law to their situation, and therefore, without procedural due process of law, and other and further relief, and plaintiffs' motion for a preliminary injunction herein, before a three-judge court as required by Section 2282, Title 28, United States Code. They request that the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit be notified pursuant to Section 2284, Title 28, United States Code, of presentation of plaintiffs' application for declaratory, injunctive, or other relief in order that necessary designation of judges for said Court may be made.

/s/ Leona Yurdin
LEONA YURDIN
Neighborhood Legal Services Program
36 N Street, S.E.
Washington, D.C. 20003
544-5000

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC
Neighborhood Legal Services Program
36 N Street, S.E.
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/s/ Edward E. Schwab
EDWARD E. SCHWAB
Neighborhood Legal Services Program
4800 Deane Avenue, N.E.
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399-4310

Attorneys for Plaintiffs

MOTION FOR CERTIFICATION OF ACTION AS MAINTAINABLE AS A CLASS ACTION

The plaintiffs, through counsel, move this Court for an order certifying this action for declaratory and injunctive relief maintainable under Rule 23(b)(1)(A); 23(b)(1)(B); or 23(b)(2) or 23(b)(3), as a class action on behalf of all recipients of Old Age, Survivors and Disability Insurance benefits. All members of this class face the danger of preemptory *exparte* termination of their benefit payments upon Administrative determinations of their ineligibilities prior to being afforded opportunities for evidentiary hearings, meeting the standards of Due Process of law on the merits of their claims to continued entitlements, in violation of their constitutional rights to Due Process of law, as authorized by 42 U.S.C. Sections 405(b), 421(a) and 421(d). Furthermore, a substantial portion of the members of this class also face preemptory *exparte* suspension of their Disability Insurance benefit payments, if the defendant Secretary believes that one of these recipients "may have ceased to be under a disability" pending his determination of "whether or not such individual's disability has ceased or until the Secretary believes such disability has not ceased", as authorized by 42 U.S.C. Section 425.

This action seeks:

(1) A temporary and permanent injunction against the defendant Secretary prohibiting him from enforcing the provisions of 42 U.S.C. Sections 405(b), 421(a), 421(d) and 425 insofar as they authorize or require the defendant Secretary to suspend or terminate the granting of Old Age, Survivors and Disability Insurance benefits to plaintiffs Radie P. Wright, Clarence Edward Wright and the other recipients of any of the above-mentioned insurances.

(2) A further order requiring the defendant Secretary to restore and continue benefit payments to plaintiffs until the conclusion of Due Process hearings on the merits of their claims to continued entitlements.

(3) And, for such other relief as the court deems proper.

As grounds for their motion plaintiffs state:

(1) The class of persons who are recipients of Old Age, Survivors and Disability Insurance benefits, and who face

the threat of preemptory *exparte* suspensions or terminations of their insurance benefits without Due Process evidentiary hearings on their claims to continued entitlements, are too numerous to make practicable joinder of all members in one action. However the identity of members of this class is readily ascertainable from the books and records of the defendant Secretary.

(2) Common questions of law and fact unite the claims of named plaintiffs and all members of the class, as more specifically described in plaintiff's attached memorandum of points and authorities in support of this motion.

(3) The claims of the named plaintiffs are typical of the claims of the class.

(4) The community of interest in questions of law and fact between named plaintiffs and the class assures fair and adequate representation of the class.

(5) Adjudications with respect to the claims of individual recipients concerning their constitutionally protected rights to continued receipt of benefits until the outcomes of Due Process hearings on the merits of their cases would, as a practical matter, be dispositive of the interests of other members not parties to the adjudications, or would substantially impair or impede their abilities to protect their interests.

(6) Prosecution of separate actions by individual members of the class against the defendant Secretary to prevent him from enforcing the provisions of 42 U.S.C. Sections 425, 405(b), 421(a) and 421(d) would create the risk of inconsistent adjudications of the issues involved herein, as set out fully in the complaint and memorandum of points and authorities in support of this motion.

(7) Injunctive relief is appropriate herein because the unconstitutional actions of the defendant Secretary in suspending or terminating the monthly benefits of recipients of Old Age, Survivors and Disability Insurance, without affording them opportunities for prior Due Process hearings on the merits of their claims, denies these recipients Due Process of law, and thereby subjects them to irreparable injuries resulting from the loss of their incomes, as fully explained in the attached complaint, motions for a temporary restraining order and a preliminary injunction and affidavit and memorandum in support thereof.

(8) The questions of law and fact common to the mem-

bers of the class predominate over the questions affecting only individual members:

(9) Most recipients of Old Age, Survivors and Disability Insurance benefits have very meager financial resources, are unaware of their legal rights and are unable to vigorously press their claims. Moreover, relegation of their claims to individual litigations would result in an unreasonable multiplicity of suits and a corresponding burden on the court. These factors make a class action superior to all other methods for fairly and efficiently adjudicating the parties' rights.

/s/ Leona Yurdin
LEONA YURDIN
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/s/ E. Calvin Golumbic
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399-4310

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RADIE P. WRIGHT, *et. al.*, *Plaintiffs*, v. ROBERT H. FINCH, *Defendant.*	CIVIL ACTION NO. 1457-70 Cash undertaking of plaintiff for $25.00 approved and filed May 19, 1970. ROBERT M. STEARNS, *Clerk* By Lemuel Patterson *Deputy Clerk*

[Filed 14 May, 1970, ROBERT M. STEARNS, *Clerk*]

TEMPORARY RESTRAINING ORDER

WHEREAS the Court has considered plaintiffs' complaint, motion for a temporary restraining order, and affidavit in support thereof, motion for a preliminary injunction, and it appears to the Court that plaintiffs Radie P. Wright and Clarence Edward Wright will suffer substantial irreparable injuries because of the losses of their sources of income, unless the Court now grants provisional relief pending a hearing and determination of plaintiffs' motion for a preliminary injunction, it is hereby:

1. ORDERED that the defendant Secretary Robert H. Finch, his agents and employees shall not put into effect or enforce the provisions of 42 U.S.C. Sections 425, 405(b), 421(a) and 421(d) insofar as they authorize or require the defendant Secretary to suspend or to terminate the Disability Insurance benefit payments of plaintiffs Radie P. Wright and Clarence Edward Wright, as authorized by 42 U.S.C. Sections 401 through 429, pending a hearing and final determination of plaintiffs motion for a preliminary injunction.

2. ORDERED that the defendant Secretary restore and continue Disability Insurance benefit payments, as determined by 42 U.S.C. Sections 402 through 403, and currently in the current amounts now being paid to plaintiff Radie P. Wright on behalf of plaintiff Clarence Edward Wright

pending a hearing and final determination of plaintiffs' motion for a preliminary injunction.

/s/ Oliver Gasch
United States District Court for the District of Columbia

DATE: May , 1970

Plaintiff shall give security in the sum of twenty-five dollars ($25.00) for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

A TRUE COPY

ROBERT M. STEARNS, *Clerk*
By Lemuel Patterson
Deputy Clerk

[*Title Omitted in Printing*]

AFFIDAVIT OF PAUL MERLIN

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss

I, Paul Merlin, being first duly sworn, depose and say as follows:

(1) I am Chief of Litigation, Social Security Division, Office of the General Counsel, Department of Health, Education and Welfare.

(2) In connection with the above captioned action I contacted this day by telephone Carl E. Spitler, Division of Management and Appraisal, Bureau of Disability Insurance, Social Security Administration, Department of Health, Education and Welfare, in Baltimore, Maryland, who advised me as follows:

(a) In 1969 there were approximately 40,000 cessations of disability under Title II of the Social Security Act.

(b) The average monthly benefits paid to disabled workers and their families amounted to approximately $250.00 per month per family.

(c) After initial determination, requests for reconsideration are processed in approximately 60 days.

(d) After reconsideration determinations requests for hearing are processed in 60 to 90 days.

(e) Based upon the foregoing estimates, I have been advised that if the Administration would have had to pay benefits to disabled workers and their families after a suspension or initial determination of cessation until the administrative hearing was held, the cost to the Social Security Trust Fund would have been $10,000,000 per month or $40,000,000 to $50,000,000 per year.

/s/ Paul Merlin
PAUL MERLIN

Subscribed and sworn to before me this 14th day of May, 1970.

/s/ Jeanne M. Swanson
Notary Public

[*Title Omitted in Printing*]

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND APPLICATION FOR CONVENING A THREE-JUDGE COURT AND DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Defendant, by his attorney, the United States Attorney for the District of Columbia, opposes plaintiffs' motion for a preliminary injunction and application for convening a three-judge Court and respectfully moves the Court to dismiss this cause for lack of jurisdiction over the subject matter. In the alternative, defendant moves the Court to grant summary judgment in its favor, on the ground there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

In support of the motion for summary judgment, defendant files herewith the affidavit of Samuel E. Crouch, Deputy Director of the Bureau of Disability Insurance of the Social Security Administration, Department of Health, Education and Welfare. Defendant also incorporates by reference the affidavit of Paul Merlin, Chief of Litigation, Social Security Division, Office of the General Counsel, Department of Health, Education and Welfare, previously filed with the Court.

/s/
THOMAS A. FLANNERY
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
LAWRENCE S. MARGOLIS
Assistant United States Attorney

OF COUNSEL

Paul Merlin
Chief of Litigation
Social Security Division
Office of the General Counsel
Department of Health,
Education and Welfare

[*Certificate of Service Omitted in Printing*]

[*Title Omitted in Printing*]

STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 9(h)

The material facts as to which there is no genuine issue are stated in the affidavit of Samuel E. Crouch, Deputy Director of the Bureau of Disability Insurance, Social Security Administration, Department of Health, Education and Welfare, and the affidavit of Paul Merlin, Chief of Litigation, Social Security Division, Office of the General Counsel, Department of Health, Education and Welfare (previously filed with the Court).

/s/
THOMAS A. FLANNERY
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
LAWRENCE S. MARGOLIS
Assistant United States Attorney

OF COUNSEL

Paul Merlin
Chief of Litigation
Social Security Division
Office of the General Counsel
Department of Health,
Education and Welfare

[*Title Omitted in Printing*]

AFFIDAVIT OF SAMUEL E. CROUCH

BALTIMORE COUNTY
STATE OF MARYLAND } ss

I, Samuel E. Crouch, being duly sworn, depose and say as follows:

(1) I am the Deputy Director of the Bureau of Disability Insurance of the Social Security Administration, the Bureau of the Administration responsible for administering the Disability Insurance Program. In connection with my official duties I have custody of the claims folder of the plaintiff in this action. My examination of this folder reveals the following.

(2) The plaintiff, Radie Wright, who was born in March 1923, filed an application for disability insurance benefits on June 1, 1966. He attributed his inability to work to arthritis, high blood pressure, stomach ulcers, and a heart condition. He was unsure as to when his disability had begun and listed 1964 or 1965. In Item 21 of the application, he agreed to notify the Social Security Administration promptly if his medical condition improved, he went to work, or he applied for workmen's compensation benefits.

(3) In connection with the plaintiff's disability claim, medical evidence was received by the Administration from the Veterans Administration, the Department of Public Welfare and Freedmen's Hospital which showed that he had problems associated with chronic alcoholism including liver disease, arthritis, stomach inflammation and heart involvement. To obtain additional medical evidence necessary for a determination of the plaintiff's claim, the District of Columbia Department of Vocational Rehabilitation, the agency for the District of Columbia which renders disability determinations under section 221 of the Social Security Act, 42 U.S.C. 421 pursuant to agreement with the Secretary, arranged an examination by a consultant physician, Dr. J. P. Segal in September 1966. Dr. Segal considered plaintiff disabled due to liver disease.

(4) Accordingly, the District of Columbia Department of Vocational Rehabilitation and the Bureau of Disability Insurance of the Social Security Administration approved

plaintiff's application for benefits on October 7, 1966 at which time it was determined he had been under a disability from October 13, 1965. Accordingly, the plaintiff was awarded monthly benefits of $97.40 from May 1966, the first month following the 6 month waiting period. With passage of the 1967 Amendments his benefit rate was increased to $110.10 per month effective February 1968.

(5) After his award of benefits, the plaintiff did not advise the Administration that he was working. The Bureau of Data Processing and Accounts of the Social Security Administration which maintains earnings records of all individuals covered under the Act, checks earnings postings against the rolls of disability beneficiaries. In this way when earnings appeared on the plaintiff's account, the Bureau of Data Processing and Accounts advised the Bureau of Disability Insurance. These posting first revealed earnings of $569.26 for two quarters of 1968 and $1,067.17 for the first quarter of 1969. As a result, on February 2, 1970, the Bureau of Disability Insurance sent a Request for Field Investigation of Continuing Disability to the Social Security District Office in Washington, D.C. to clarify the plaintiff's current work status.

(6) Thereafter, the plaintiff was contacted by Miss Karen Salvatore, a claims representative of the Washington, D.C. District Office, on February 11, 1970. In a Report of Continuing Disability Interview, the plaintiff admitted in reply to Question V that he had worked since the established onset date of his disability. A Work Activity Report was also completed showing that he had been employed by Pepco and Shayne Brothers. However, the plaintiff's apparent poor memory and his difficulty in communicating, prevented the claims representative from obtaining anything except a very few details of the plaintiff's employment. Accordingly, the representative indicated further development of the work activity was necessary. Upon contact by the district office, a Statement of Employer form was completed by Shayne Brothers on February 12, 1970 showing wages paid to plaintiff in the amounts of $248.32 for the December 1968 quarter, $1,067.17 for the March 1969 quarter, $1,064.20 for the June 1969 quarter, $789.48 for the September 1969 quarter, and $162.24 for the December 1969 quarter. The employer stated they were in the refuse removal business and the plaintiff was a helper.

After Pepco (Potomac Electric Power Company) informed the Social Security Administration on February 18, 1970, that the plaintiff had not been in their employ, the plaintiff was recontacted. In a Statement of Claimant or Other Person prepared on March 4, 1970, he stated he had worked for F. B. Joy Company rather than Pepco. He also reported "I am not working now. I stopped working about October 1969. I have done no work since that time." The F. B. Joy Company completed a Statement of Employer on March 11, 1970 showing the plaintiff earned $1,015.40 for the December 1969 quarter. The company stated they were in the contracting business and the plaintiff was a laborer. A further breakdown of wages for this company, dated March 12, 1970 showed earnings of $75.20 for October 1969, $511.71 for November 1969, and $428.49 for December 1969.

(7) The district office in Washington, D.C., forwarded the file to the District of Columbia Department of Vocational Rehabilitation on March 16, 1970 for a disability determination. The State agency received the file on March 19, 1970 and concluded on March 25, 1970 that the plaintiff's disability ceased in August 1969 because he had demonstrated ability to engage in substantial gainful activity. Thereafter, the State agency forwarded the file to the Bureau of Disability Insurance for review of the cessation determination in accordance with section 221 of the Act, 42 U.S.C. 421. Upon receipt of the file, the Bureau of Disability Insurance, on April 3, 1970 issued a Request for Suspension of Termination of Benefits and on April 10, 1970 the Stop Payment Determination was prepared. By letter dated April 14, 1970, the plaintiff was notified that his payments had been stopped. On April 3, 1970, the Bureau of Disability Insurance also requested the Bureau of Data Processing and Accounts to furnish a detailed earnings record for the June and December 1968 quarters. This form, completed on April 14, 1970, indicated that plaintiff also had earnings in the June 1968 quarter from the United Contractors, Inc., in the amount of $240.00 and from the Interstate Restaurants, Inc., in the amount of $80.94, and in the December 1968 quarter from the S. J. Cohen Plumbing and Heating Corporation in the amount of $94.00.

(8) On April 15, 1970, the Bureau of Disability Insurance prepared a Request for Additional Evidence of Disability asking the Social Security District Office in Wash-

ington, D.C. to further develop the plaintiff's work in 1968. Thereafter, the district office received information from S. J. Cohen Plumbing and Heating Corporation dated May 1, 1970 showing plaintiff earned $94.00 in October 1968; from Interstate Restaurants, Inc. dated May 1, 1970 showing plaintiff earned no wages for the year 1968 under account number 578-16-2424; but wages of $42.40 under account number 577-70-0880, with a question mark, were listed for March 1970; and from Shayne Brothers dated May 6, 1970 showing plaintiff earned $248.32 in December 1968.

(9) To summarize, the cumulative quarterly earnings information for 1968 and subsequent years shows:

United Contractors, Inc. June 1968—$240.00 (not yet verified by employer contact)

Interstate Restaurants, Inc. June 1968—$80.94 (not yet verified by employer contact)

S. J. Cohen Plumbing and Heating Corporation December 1968—$94 (verified)

Shayne Brothers, Inc. December 1968—$248.32 (verified)

Shayne Brothers, Inc. March 1969—$1,067.17 (verified)

Shayne Brothers, Inc. June 1969—$1,064.20 (verified)

Shayne Brothers, Inc. September 1969—$789.48 (verified)

Shayne Brothers, Inc. December 1969—$162.24 (verified)

B. F. Joy Co., Inc. December 1969—$1,015.40 (verified)

Interstate Restaurants, Inc. March 1970—$42.40 (not yet verified by empolyer contact)

Based on the above information, the plaintiff had verified earnings of $342.32 for 1968 and $4,098.49 for 1969.

(10) In accordance with the court's order dated May 14, 1970, benefits for the plaintiff were reinstated on May 15, 1970 and May 16, 1970. Current payment to the plaintiff will be $126.70 per month from January 1970. Family benefits in this case have varied greatly both as to payees

and amounts because of changing dependency factors of the family. Present development is being undertaken in this respect.

/s/
SAMUEL E. CROUCH
Deputy Director
Bureau of Disability Insurance

Subscribed and sworn to before
me this 22nd day
of May 1970.

Wilson R. Touler
Notary Public
My Commission expires July 1, 1970

[*Title Omitted in Printing*]

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO HIS MOTION FOR A PRELIMINARY INJUNCTION AND APPLICATION FOR CONVENING A THREE-JUDGE COURT, OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff, by his attorneys, hereby replies to Defendant's opposition to his motion for a preliminary injunction and application for convening a three-judge court, opposes Defendant's motion to dismiss and, in the alternative, moves this Court on the pleadings, exhibits, affidavits and other papers, filed in this proceeding, and on the statement of material facts, as to which he contends there is no genuine issue, for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, on the grounds that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.

As part of this motion, Plaintiff adopts, and by reference incorporates herein, his memorandum in support of motion for preliminary injunction as well as his memorandum of points and authorities in support of application for a three-judge court, previously filed with this Court.

/s/ Leona Yurdin
LEONA YURDIN
36 N Street, S.E.
Washington, D.C.
544-5000

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC
36 N Street, S.E.
Washington, D.C.
544-5000

/s/ Edward E. Schwab
EDWARD SCHWAB
4300 Deane Avenue, N.E.
Washington, D.C.
399-4310

Attorneys for Plaintiff

[*Certificate of Service Omitted in Printing*]

[*Title Omitted in Printing*]

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH HE CONTENDS THERE IS NO GENUINE ISSUE

Plaintiff hereby respectfully submits, in compliance with Rule 9(h) of the Local Civil Rules, the material facts, as to which there is no genuine issue, contained in Plaintiff's Affidavit in Support of Motion for Temporary Restraining Order and Preliminary Injunction, Plaintiff's Supplemental Affidavit in Support of Motion for Preliminary Injunction as well as all facts set forth in Plaintiff's Complaint and attached Exhibits, Affidavit of Clara Little Wright in Support of Plaintiff's Motion for Preliminary Injunction and letter from Dr. Emerson Williams, M.D., to Leona Yurdin, which are, by reference, made a part hereof and reflect the material facts as they exist in this case.

/s/ Leona Yurdin
LEONA YURDIN
36 N Street, S.E.
Washington, D.C.
544-5000

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC
36 N Street, S.E.
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/s/ Edward E. Schwab
EDWARD SCHWAB
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399-4310

Attorneys for Plaintiff

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PLAINTIFF'S OPPOSITION TO DEFENDANT'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff, through counsel, hereby opposes in good faith the facts presented by Defendant in the Affidavit of Paul Merlin, Chief of Litigation, Social Security Division, Office of the General Counsel, Department of Health, Education and Welfare (previously filed with the Court), specifically found in paragraph (2)(e) thereof.

/s/ Leona Yurdin
LEONA YURDIN
36 N Street, S.E.
Washington, D.C.
544-5000

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC
36 N Street, S.E.
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/s/ Edward E. Schwab
EDWARD SCHWAB
4300 Deane Avenue, N.E.
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399-4310

Attorneys for Plaintiff

[*Certificate of Service Omitted in Printing*]

AFFIDAVIT IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

I, Clara Little Wright, being duly sworn, depose and state the following as my affidavit in support of my husband Radie P. Wright's motion for a preliminary injunction filed in this action:

1. I am 45 years old and was born on April 25, 1925. I was raised in Wadesboro, North Carolina and completed the 10th grade in public school. I began doing farm work when I was 10 years old.

2. On June 27, 1949, I married Radie P. Wright in Chesterfield, North Carolina. In 1953 I joined my husband who had moved to the District of Columbia in 1952. We have lived together since that time.

3. Since the date of my marriage I have not had a regular job, either full time or part time. I am an out-patient at the Freedman's Hospital Clinic and receive treatments for nervous system disorders and kidney malfunctions. My doctor has advised me not to stand on my feet for long periods and not to do heavy lifting or any strenuous work. Consequently, I have not been able to be employed.

4. My clothing primarily consists of about four nice dresses, worn to attend church services, two or three housework dresses, one skirt and blouse purchased for Easter of this year and costing about $5.00 and $1.00, respectively, one old winter coat, and old second hand raincoat, three old cardigan sweaters, one pair of work shoes, two pairs of better shoes, two old slips, about five pairs of underwear, about two old brassiers, one old hat, two handbags and to better handbags.

5. To the best of my knowledge, information and belief, the facts stated by my husband in his affidavit and supplementary affidavit in support of his motions for a temporary

restraining order and preliminary injunction, both filed herein, are true.

/s/ Clara Little Wright
CLARA LITTLE WRIGHT

SUBSCRIBED AND SWORN TO before me this 15 day of June 1970.

William T. Matthews
Notary Public

My commission expires:

William T. Matthews
Notary Public D.C.

My Commission Expires Sept. 14, 1971

SUPPLEMENT TO AFFIDAVIT OF RADIE P. WRIGHT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, Radie P. Wright, being duly sworn, depose and say the following as a supplement to the affidavit previously submitted in support of my motions for a temporary restraining order and a preliminary injunction:

1. Since May 1966, when I became entitled to Social Security Disability Insurance benefits, I have never understood that if I worked I might lose my disability insurance benefits. From television and radio news annotuncements my understanding has been that President Nixon had authorized all recipients of Federal Government benefits to work while they continued to receive their benefits. I worked because my family needed more money to buy the necessaries of life. My employments have caused me great physical discomfort and have worsened my state of health. I stopped working because I became too sick to continue. Had I known that working would endanger my continued receipt of disability insurance benefits, I would not have sought employments.

I promptly complied with a request sent to me by the Social Security Administration asking that I speak with a claims representative about my disabled condition. As I stated in my affidavit filed in suport of my motions for a temporary restraining order and preliminary injunction, I reported to the claims representative that I had not worked since December 1969 because of my very poor physical condition. I also stated where I had worked and described the nature of that work. The claims representative did not inform me that my work would cause me to lose my disability benefits. The claims representative explained that the Social Security Administration was simply investigating my condition. I was not told not to work, but have been unable to seek employment because of my disability.

2. On May 28, 1963, my youngest son Clarence Edward Wright became a ward of the District of Columbia Department of Public Welfare. Under order of the Juvenile Court of the District of Columbia, he was sent to the Mapel Glen facility in the District of Columbia Children's Center in Laurel, Maryland. He remained there two years and on

June 23, 1965, he was recommitted by the Juvenile Court to the Children's Center for an indefinite term.

At the Children's Center it was found that my son is mentally retarded. He was therefore transferred to the Children's Center facility for the treatment of mentally retarded children. From September 10, 1967 to January 23, 1970, he was treated at Saint Elizabeth's Hospital. His medical record indicates, among other thing, that he has brain damage, evidence of schizophrenia and is a homosexual.

On May 9, 1970, Clarence was returned home and has been living with me and my wife Clara at our home. However, Clarence takes medication daily and must make visits to Saint Elizabeth's. We have been informed that he can remain with us as a visitor for one month. Thereafter, if the Department of Public Welfare determines his home and community adjustment has been good, he may be permitted to remain with us indefinitely.

3. Since May 1, 1970, when my Social Security Disability benefits were terminated, my wife, my family and I have suffered from not having any income with which to buy the necessities of life. Our daily diet for the month of May primarily consisted of beans, white potatoes, cabbage, some other greens, and some cold cereal. We quickly exhausted our small supply of milk, eggs, butter, meat, cheese and other high protein foods. When we had income from my Social Security Disability Insurance, we eat chicken, beef stew, pork, eggs, milk and other green vegetables. Because of my damaged liver and other weaknesses, my doctors have urged me to eat milk, eggs, meat and high protein foods everyday. Since we have no money, I have been unable to follow my doctors' recommendations and consequently have worsened my physical condition. The poor diet we have been compelled to maintain has also caused a worsening of my wife Clara's physical and mental conditions.

4. My son Radie Jr. works part time in a car-wash business in Bethesda, Maryland. However, he is unable to contribute to my support or to the support of my wife or his brother Clarence, nor does he contribute toward the payment of rent and other household expenses.

5. My clothing currently consists of one pair of old shoes, one pair of old slippers, three old short-sleeved white

shirts, two pairs of old undershorts, three pairs of old undershirts, three pairs of old slacks, one old suit jacket, one old second hand raincoat, one old heavy coat, two pairs of old socks with holes, one old hat, no rubbers and no other significant item of clothing.

6. My son Radie Jr. also has a very meager supply of clothing. He has no suit, two pairs of old slacks, two or three shirts, about four pairs of old underwear, and a few tee shirts. I have bought no clothing in the past month.

7. My son Clarence's wardrobe consists of the few articles of clothing given him while he was living at the Children's Center. He has two pairs of old pants, two shirts, one pair of old shoes, one pair of old sneakers and about two old pairs of underwear.

8. Our household furniture for our two bedroom house primarily consists of two old double beds, with two old mattresses, one small clothes bureau, three clothing closets, two old sofas, about five chairs, one old second-hand television, two inexpensive radios, two old small throw rugs and a second-hand kitchen table with second-hand chairs. We have two waste paper baskets, and very few dishes, pots and pans. Our linen supply consists of about six towels, four sheets, two pillows and four pillow cases. We have no decent rugs, no lamps and no work or coffee tables.

/s/ Radie P. Wright
RADIE P. WRIGHT

SUBSCRIBED AND SWORN TO before me this 11th day of June 1970.

/s/ Marlin L. Casto
Notary Public

My commission expires:

Marlin L. Casto
Notary Public DC

My commission expires July 14, 1973

[Certificate of Service Omitted in Printing]

[*Title Omitted in Printing*]

SUPPLEMENT TO AFFIDAVITS OF RADIE P. WRIGHT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I, Radie P. Wright, being duly sworn, depose and say the following as a supplement to the affidavits previously submitted in support of my motions for a temporary restraining order and a preliminary injunction:

1. Since the fall of 1965, when I suffered a hemorrhage and was admitted to Freedman's Hospital in the District of Columbia, I have been consistently advised by my consulting physicians that I should not work because of a severe permanent disability.

2. Only recently I requested an opinion in that respect, through my counsel, from Emerson A. Williams, M.D., my present consulting physician, and he advised by letter to Miss Leona Yurdin dated June 23, 1970 (attached hereto) that I am still unemployable due to my present physical condition.

/s/ Radie P. Wright
RADIE P. WRIGHT

SUBSCRIBED AND SWORN TO before me this 30th day of July 1970.

/s/ Martin L. Casto
Notary Public

My commission expires: July 14, 1973

[*Certificate of Service Omitted in Printing*]

EMERSON A. WILLIAMS, M. D.
705 KENYON STREET, N. W.
WASHINGTON, D. C. 20010
TELEPHONE 529-3191

23 June 70.

Miss Wanda Yarden
Neighborhood Legal Service
36 N. Street SE
Washington, D.C.

Dear Miss Yarden:

Concerning Mr. Radie Wright whom I have seen personally in the Martin Luther Clinic at Freedmen's & whose full medical record I have reviewed, it is my personal opinion he is unemployable & ineligible for welfare assistance. He has multiple medical problems including cardiac disease, hiatus hernia, cirrhosis of the liver, depressive reaction, degenerative bone disease.

Sincerely yours,
Emerson A. Williams

MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION AND TO JOIN AS PARTY PLAINTIFF

Applicant for intervention, John Dillard Atkins, Jr., by his counsel, respectfully moves this Court for leave to file a complaint in intervention and to join as party plaintiff in the above-captioned action, and in support thereof states as follows:

1. Applicant's complaint in intervention and affidavit in support thereof, attached hereto, set forth the facts upon which his claim is based.

2. Applicant's claim and prayer for relief are parallel to those set forth in the cause presented to the Court by the Plaintiff Radie Wright.

3. Applicant is a member of a class in which all members have been found entitled to receive Old Age, Survivors, and Disability Insurance benefits under Title II of the Social Security Act, 42 U.S.C. Sections 401-429, and who face preemptory, *ex parte* suspension or termination of their payments upon an administrative determination of ineligibility, prior to being afforded an opportunity for an evidentiary hearing, pursuant to 42 U.S.C. Sections 405(b), 421(a), 421(d) and 425, in violation of rights guaranteed under the Due Process Clause of the Fifth Amendment to the United States Constitution.

4. It is in the applicant's interest, and that of the Court, to have the issue of the Constitutionality of Sections 205(b), 221(a), 221(d) and 225 of the Social Security Act (42 U.S.C. Sections 405(b), 421(a), 421(d) and 425), insofar as they authorize or require the defendant Secretary to terminate Social Security Disability Insurance benefit payments without adequate notice and prior opportunity for a fair hearing, decided so as to avoid further confusion and repetitious litigation.

5. Applicant submits that no prejudice to the parties

would result through this Court's granting leave to file a complaint in intervention at this time.

Respectfully submitted,

/s/ Leona Yurdin
LEONA YURDIN
36 N Street, S.E.
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544-5000

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC
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/s/ Edward E. Schwab
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4300 Deane Avenue, N.E.
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Attorneys for Applicant

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[*Title Omitted in Printing*]

COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

(Request for Three-Judge Court)

I

This is a complaint in intervention seeking declaratory injunctive relief to protect applicant-for-intervention, John Dillard Atkins, Jr.'s rights under Title II of the Social Security Act, 42 U.S.C. Sections 401 *et seq.* and regulations promulgated thereunder, and the due process clause of the Fifth Amendment to the United States Constitution. This action arises under the Constitution and laws of the United States, including the Fifth Amendment to the Constitution and 42 U.S.C. Sections 402(d) and 423.

II

Jurisdiction of this court is invoked pursuant to 11 D.C. Code, Section 521 (1967 ed.) and 28 U.S.C. Sections 1331, 1343(4), 1361, 2201, 2282, and 2284. The amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs.

III

This an appropriate case for the convening of a three-judge court, pursuant to 28 U.S.C. Sections 2282 and 2284, in that the applicant-for-intervention seeks an injunction against the enforcement, operation and execution of Acts of Congress, 42 U.S.C. Sections 425, 405(b), 421(a) and 421(d) (a copy of which is attached hereto as Exhibit A), insofar as these statutes authorize or require suspension on termination of financial benefits prior to granting adequate notice and opportunity to be heard, on grounds of their repugnance to the due process clause of the Fifth Amendment to the Constitution of the United States.

IV

This action seeks an injunction and declaratory judgment declaring unconstitutional and restraining the enforcement

of the aforesaid Acts of Congress, on their face and as applied and interpreted by defendant, on the grounds that said statutes, and actions taken pursuant thereto, deny to the applicant-for-intervention due process of law guaranteed by the Fifth Amendment to the United States Constitution, in that said statutes deny to the applicant-for-intervention reasonable and adequate notice of the grounds of suspension or termination of his Disability Insurance benefits, and deny to the applicant-for-intervention an opportunity for a fair and proper evidentiary hearing prior to the termination of his Disability Insurance benefits.

V

Applicant, John Dillard Atkins, Jr., is an adult citizen of the United States and has been a domiciliary resident of the State of Virginia since 1945. Applicant, John Dillard Atkins, Jr., has been married to Martha Ruth Atkins for 28 years and they have two adult children presently married and living elsewhere. Applicant's domiciliary residence is located at 2546 Military Road, Arlington, Virginia, where his wife currently resides. Applicant resides at present in the Veterans Administration lodge as a mental patient of the Veterans Administration Hospital in Salem, Virginia, where he has been hospitalized continuously from January 18, 1969 and as a resident of the lodge since July 18, 1969.

VI

Applicant, John Dillard Atkins, Jr., has a history of mental disorder and was admitted to the Veterans Administration Hospital in Perry Point, Md. in December 1966 under a psychiatric diagnosis of extreme depression and has remained under psychiatric care continuously until the present time. He applied for social security disability benefits in December 1966 and was awarded disability benefits in July 1967, after a six month initial waiting period, on the bais of a determination, pursuant to 42 U.S.C. Sections 423(d)(1)(A), of his "inability to engage in any substantial gainful activity by reason of (a) medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

VII

Applicant is a member of a class in which all members have been found entitled to receive Old Age, Survivors, and Disability Insurance benefits under Title II of the Social Security Act, 42 U.S.C. Sections 401-429. All of the members of this class face peremptory, *ex parte* termination of their payments upon an administrative determination of ineligibility prior to being afforded an opportunity for an evidentiary hearing. The authority to terminate payment and then grant an opportunity for a hearing is granted by 42 U.S.C. Sections 405(b), 421(a), and 421(d), and is in violation of rights guaranteed under the Due Process Clause of the Fifth Amendment. A substantial portion of this class, including the named applicant, face peremptory, *ex parte* suspension of benefits if the defendant believes they "may have ceased to be under a disability", pending his determination of whether "disability has ceased or until the Secretary believes that such disability had not ceased" as authorized by 42 U.S.C. Section 425. Applicant brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of himself and all persons constituting the above class who are similarly situated. The persons in the class are so numerous that joinder of all members is impractical; there are questions of law or fact common to the class; the claims of the representative parties are typical of the class; and the representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class; adjudications with respect to individual members of the class would, as a practical matter, be dispositive of other members not parties to the adjudications; the questions of law and fact common to the members of the class predominate over any questions affecting only individual members; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

VIII

Defendant Robert H. Finch is the Secretary of Health, Education and Welfare and, as such, is charged with the

administration of Title II of the Social Security Act, 42 U.S.C. Sections 401 *et seq.;* and in particular with the determination of entitlement to benefits on the basis of disability pursuant to 42 U.S.C. Sections 402(d) and 423.

IX

Applicant, John Dillard Atkins, Jr., began part time employment at 14 years of age for the Atlantic and Pacific Tea Company. In 1934, at age 18, he began full time employment with the Civilian Conservation Corps and worked in that capacity until August 1936. At that time he enrolled at North Carolina State College at Raleigh, North Carolina and graduated with a Bachelors Degree in June 1940. Applicant entered the Marine Corps in July 1940 as a commissioned officer (second lieutenant). He remained on active status with the Marine Corps until April 1945. He did retire in 1943 because of a physical disability, but remained on active duty until 1945. The disability was diagnosed, at the Norfolk Naval Hospital in Portsmouth, Virginia, as being psychiatric in nature and was apparently the same or a related disability to that which he is now suffering. In July 1945, applicant began working for the Virginia Forrest Service and continued that employment until April 1947. In September 1947, applicant commenced teaching (mathematics) at a high school in Aldie, Virginia. He completed the school year in June 1948 and at that time commenced a Masters degree program at George Washington University. The George Washington University awarded a Master of Arts degree in education in 1949. In September 1949, applicant, John Dillard Atkins, Jr., began working in the Arlington County School system as a teacher and continued employment in that capacity until December 1966. In the spring of 1966, applicant voluntarily entered Bethesda Naval Hospital in the Neuro-psychiatric ward for approximately three months. In the fall of 1966, he began teaching again in Arlington County and continued until December 1966 whereupon he completed his last employment in any capacity whatsoever.

X

Applicant, John Dillard Atkins, Jr. left his teaching position with the Arlington County School system in Dec-

ember 1966 in order to enter the Veterans Administration (mental) Hospital at Perry Point, Maryland because of severe psychiatric problems. He remained at the hospital in Perry Point until January 7, 1969. On January 8, 1969, applicant was committed by the Arlington County Court, Judge Dodge, to the Western State Hospital in Staunton, Virginia and later transferred, on January 18, 1969, to the Veterans Administration Hospital in Salem, Virginia, where he has been continuously and is still a patient at this time. On April 10, 1967, applicant's physician at the Veterans Administration Hospital in Perry Point, Maryland, diagnosed him as essentially totally and permanently disabled. This diagnosis was confirmed by letter to the Virginia Supplemental Retirement System dated April 10, 1967. The prognosis was, in part, that:

> "(It) is highly unlikely that he can ever reintegrate to a level that would qualify him to return to active teaching. It is even inconsiderably at this time that the patient will ever be able to make a responsible social adjustment living outside of the psychiatric hospital."

See Exhibit A attached hereto. This prognosis was made on the basis of continuous psychiatric treatment at the Perry Point Veterans Administration Hospital for approximately one year and a half (December 1966 until April 1967). Due to applicant's mental condition from December 1966 until the present, all of which time he has been institutionalized as a mental patient, it has been impossible for him to continue employment as a teacher or in any other capacity. In December 1966 applicant applied for social security disability benefits and was awarded disability benefits in July 1967, after a six month initial waiting period.

XI

Applicant, John Dillard Atkins, Jr., continued to receive social security disability benefits from July 1967 until February 3, 1970 when he received a letter of that date from the Social Security Administration advising him, in pertinent part, that:

"The medical evidence in your case shows that your

condition has improved to the extent that you became able to do substantial gainful work in January 1970. Accordingly, the last disability benefit to which you are entitled is for the month of March 1970." Exhibit B attached hereto.

XII

On February 4, 1970, (one day after receipt of the letter of termination), applicant, John Dillard Atkins, Jr., directed a letter to the Social Security Administration advising them that, contrary to their assertion that he was able to do substantial gainful work in January 1970, his last date of gainful employment was December 13, 1966 and that he is now and has continuously been a patient at the Veterans Hospital in Salem, Virginia since January 16, 1969. He further advised that: "I have never been discharged from that hospital." See Exhibit C attached hereto. On the day after recipt of the letter terminating applicant's social security benefits, February 4, 1970, applicant's wife contacted the office of Congressman Joel T. Broyhill, requesting some form of help. In response to her request, Congressman Broyhill sent a telegram on February 5, 1970 to the Social Security Administration advising them that the applicant was totally disabled and requesting that his office be informed concerning the applicant's status. Exhibit D attached hereto. Furthermore, shortly after receiving the letter of termination dated February 4, 1970, applicant's wife telephoned the Social Security Administration in three different instances. In each instance she talked to a different person. On the last occasion, she explained to Commissioner Ball's Assistant that if she and her husband (applicant herein) did not know if there was any chance of reinstatement or even reconsideration by April 1, 1970, it would be necessary to sell their home. Thereafter, applicant and his wife directed approximately ten letters to the Social Security Administration requesting information in regard to applicant's status and whether he would be reinstated or even receive a reconsideration by April 1, 1970, without even receiving any response or reply by the Administration other than a letter to Congressman Broyhill's office advising that applicant's termination was under investigation, but failing to comment on whether

or not a decision would be reached by the crucial terminating date of April 1, 1970.

XIII

On April 23, 1970, the Social Security Administration advised Congressmen Broyhill by telegram that they had determined that applicant, John Dillard Atkins, Jr., was still disabled within the meaning of the law. Exhibit E attached hereto.

XIV

Applicant's, John Dillard Atkins, Jr., condition and situation from January 1970, when the letter of termination dated February 3, 1970 stated he was medically able to do substantial employment, until reinstatement on April 21, 1970, remained virtually the same. During that period, he remained and is still a patient at the Veterans Administration Hospital, Salem, Virginia, residing in the Veterans Administration lodge as a mental patient.

XV

Nevertheless, applicant was forced to undergo the severe mental strain of fearing the imminent termination of his social security benefits by March 1970, without a hearing, and without ever being assured by the Social Security Administration that his case would even be reconsidered or reviewed by that time.

XVI

On April 30, 1970, applicant received a letter from the Social Security Administration, dated April 29, 1970 (six days after the Social Security Administration saw fit to notify Congressman Broyhill by telegram), advising that:

> "We recently reviewed the evidence in your disability claim and find that you are still disabled.
>
> The evidence we have indicates your condition may improve in the future. *Thus, we scheduled your claim for another review about September, 1971.*" (emphasis added)

XVII

It appears that, on the basis of past experience, applicant can look forward, at that time, to the prospect of another possible termination (or suspension ending investigation) of benefits, without a hearing and without even any assurance by law that his case will even be reviewed or reconsidered before his benefits are terminated.

XVIII

The consequences of the Social Security Administration's determination to terminate applicant's disability benefits by March 1970 have been catastrophic. Applicant's total monthly income consists of statutory benefits received from social security, V.A. compensation and Virginia State retirement. The prospective loss of his social security benefits would have seriously impaired his ability to maintain his current obligations. Consequently, his wife took a third trust on their house on March 17, 1970, and later sold their home on April 5, 1970. Exhibit G attached hereto.

XIX

Applicant, John Dillard Atkins, Jr., due to his present state of health, is presently unable to maintain gainful employment and provide support for himself and his family. Moreover, considering the lengthly period in which applicant has recently been institutionalized because of mental illness (the last 3½ years), it appears that there is little chance of applicant being able to assume gainful employment and provide support for himself and his wife in the foreseable future, certainly not by September 1971. Accordingly, because of the prospective loss of social security income in September 1971, without a hearing, applicant and his wife suffer severe mental anguish and immediate, continuing and irreparable injury to their health.

XX

Title II of the Social Security Act, 42 U.S.C. Section 401 *et seq.*, creates a program of Disability Insurance under which individuals who have accumulated certain quarters of coverage and suffer a totally disabling impairment of enduring character become thereby entitled to earning-replacement benefit payments for themselves and their de-

pendents. Persons who meet the statutory criteria (42 U.S.C. Sections 402(d) and 423), as interpreted in the Department of Health, Education and Welfare regulations, receive disability insurance payments as a matter of statutory entitlement.

XXI

Defendant's preemptory, *ex parte* action suspending or terminating applicant's social security disability insurance benefits violates the Due Process Clause of the Fifth Amendment to the United States Constitution in that it effectively suspended or terminated and withheld benefits essential to life itself without affording applicant, John Dillard Atkins, Jr., reasonable and adequate notice as well as an opportunity for a prior fair hearing.

XXII

Sections 205(b), 221(a), 221(d) and 225 of the Social Security Act, 42 U.S.C. Sections 405(b), 421(a), 421(d) and 425 are invalid and repugnant to the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as they authorize or require the defendant Secretary to take preemptory, *ex parte* action suspending or terminating benefits without affording reasonable and adequate notice and an opportunity for a prior fair hearing.

WHEREFORE, applicant-for-intervention respectfully prays that this Court:

1. Assume jurisdiction of this case;

2. Convene a three-judge Court to hear this cause;

3. Enter a Preliminary and Permanent Injunction (A) restraining the operation and enforcement of 42 U.S.C. Sections 405(b), 421(a), 421(d) and 425 insofar as they authorize or require the defendant Secretary to put into effect the suspension or termination of social security disability insurance benefits to applicant, and (B) requiring the defendant Secretary to continue benefit payments to applicant until notice and opportunity for a hearing meeting Due Process standards are afforded;

4. Declare that 42 U.S.C. Sections 405(b), 421(a), 421(d) and 425 are invalid as repugnant to the Due Process required by the United States Constitution insofar as they authorize or require termination of social security disability

insurance benefits payments without adequate notice and prior opportunity for a fair hearing;

5. Certify applicant and those who are similarly situated as a class, pursuant to Rule 23 of the Federal Rules of Civil Procedure, in respect to all rights and liabilities involved in this action;

6. Declare the other rights and relations of the parties hereto;

7. Award Costs to applicant; and

8. Enter such other further relief as the Court may deem just and appropriate.

/s/ John Dillard Atkins, Jr.
JOHN DILLARD ATKINS, JR.

/s/ Leona Yurdin
LEONA YURDIN
36 N Street, S.E.
Washington, D.C. 20003
544-5000

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC
36 N Street, S.E.
Washington, D.C. 20003
544-5000

/s/ Edward E. Schwab
EDWARD SCHWAB
4300 Dean Avenue, N.E.
Washington, D.C.
399-4310

Attorneys for applicant for Intervention

DISTRICT OF COLUMBIA, ss:

I, John Dillard Atkins, Jr., being first duly sworn on oath, depose and say that I have read the foregoing complaint in intervention by me subscribed and that the facts stated therein are true to the best of my knowledge, information and belief.

/s/ John D. Atkins, Jr.
JOHN D. ATKINS, JR.

SUBSCRIBED AND SWORN TO before me this 16th day of June 1970.

/s/ Dorothy R. Cox
Notary Public

My commission expires: March 25, 1973.

[*Certificate of Service Omitted in Printing*]

SES-17
1 of 2

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM
300 FINANCE BUILDING,
Richmond, Virginia

REPORT OF PHYSICIAN

Dear Doctor , you are authorized to fill out this form and forward same to the Virginia Supplemental Retirement System, P. O. Box 3X, Richmond, Virginia.

/s/ John D. Atkins, Jr.
Signature of Applicant

4-10-67
Date

Address

ABOVE TO BE EXECUTED AND SIGNED BY APPLICANT FOR DISABILITY RETIREMENT

TO THE PHYSICIAN RENDERING THE FOLLOWING REPORT:

It is important that you make a full report of the patient's illness and the details of your findings, so that the Medical Board of the Virginia Supplemental Retirement System whose duty it is to review the report and render an opinion will have a clear-cut picture of the patient's condition. Simply stating "arthritis", "heart disease", "nervous trouble", etc., without going into the details of the patient's complaints and objective findings, the degree of disability and a reasonably comprehensive statement as to the prognosis and treatment, does not give sufficient information on which to adequately evaluate the report. Lack of sufficient medical evidence will result in the Medical Board not being able to promptly and properly determine the case of the above applicant for disability retirement.

Your complete cooperation will avoid delay and be appreciated.

I hereby certify Mr. John D. Atkins has been under my professional care since 12-14-66.

1. DIAGNOSIS: Depressive reaction.

2. TREAMENT: This patient has been under continuous psychiatric treatment here at Perry

Point Veterans Administration and has received intensive therapy and also has been treated with various tranquilizers and mood affecting drugs. The patient remains an extremely inhibited and anxious man whose character structures no longer is successful in warding off the continuing decompensation and essentially totally disability.

In view of the extensive efforts, without success, that this man has experienced are very real regression and also he may have made a "satisfactory adjustment."

3. PROGNOSIS: He was a teacher some years ago, but is highly unlikely that he can ever reintegrate to a level that would qualify him to return to active teaching. It is even inconsiderably at this time that the patient will ever be able to make a responsible social adjustment living outside of the psychiatric hospital.

Kindly mail report to Virginia Supplemental Retirement System, P. O. Box 3X, Richmond, Virginia.

/s/ W. M. Harris, M.D.
W. M. Harris, M.D.
Signature of Physician

William M. Harris, M.D.
Type or Print Name of Physician

VAH, Perry Point, Maryland 21902
Address

4-10-67
Date

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21241

Refer to: 246-12-5511 HA
When Writing To:
Social Security Office
Alexandria VA
February 3, 1970

John T Adkins Jr
2546 Military Rd N
Arlington VA 22205

The law provides that an individual's disability period shall end if his condition improves so that he becomes able to do substantial gainful work. The law also provides that an individual will receive his benefit payments for the month his disability ends and the following two months. The medical evidence in your case shows that your condition has improved to the extent that you became able to do substantial gainful work in January 1970. Accordingly, the last disability benefit to which you are entitled is for the month of March 1970.

The decision on your claim was made by the Social Security Administration on the basis of a disability determination by an agency of the State in which you live. Physicians and other trained disability evaluation personnel in the State agency participated in making this determination.

If your condition again prevents you from doing substantial gainful work before age 65, you should get in touch with your social security office about filing a new application for disability benefits.

If you believe that this determination is not correct, you may request that your case be re-examined. If you want this reconsideration, you must request it not later than 6 months from the date of this letter. You may make any such request through your social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explana-

tion of your right to question the determination made on your claim.

If you have any questions about your claim, you should get in touch with your social security office. If you call in person, please take this notice with you.

Sincerely yours,

/s/ F. H. Sheel
F. H. SHEEL
Director, Division of Evaluation and Authorization
Bureau of Disability Insurance

Enclosure:
SSI-58

542 Walnut Ave., S. W.
Roanoke, Va. 24016
February 4, 1970

U. S. Department of Health, Education
and Welfare
Social Security Administration
Alexandria, Va.

Gentlemen: Attention: Mr. Colins

My name is John D. Atkins, Jr., and my Social Security number is 246-12-5511.

Please refer to your letter of February 3, 1970, addressed to John T. Adkins, Jr. at 2546 Military Road, Arlington, Va. Note that my middle initial is "D"; not "T". Note also that I live at 542 Walnut Ave., S. W., Roanoke, Va.; not at 2546 Military Road, Arlington, Va.

Your letter says that I am gainfully employed and have been for some time. My last date of gainful employment was December 13, 1966. At that time I left the employ of the Arlington County, Virginia, School Board. I was on sick leave until about the second week of February, 1966, but I did not earn any salary after that date.

I am still a patient at the Veterans Hospital, Salem, Va., and have been a patient there since January 16, 1969. I have never been discharged from that hospital.

Since there is an error in my name as shown in your letter of February 3, 1970, someone may be posting earnings to my account in error. Please investigate.

If I have the right to appeal your decision, this is my notice of an appeal. I am asking officials at the hospital where I am a patient to send you substantiating materials. Their statements will follow.

It is requested that you reply to this letter stating your action. According to your 1969 edition of "Rights and Responsibilities of Those Who Receive Social Security Disability Benefits", you normally give people three months at substantial gainful work before you take away their benefits. I have had no substantial gainful work since De-

cember 13, 1966, yet you tell me on February 3, 1970, that you will stop payments to me in March, 1970. I request that you give me the normal time of three months in which to show that someone has made a mistake.

Sincerely,
John D. Atkins, Jr.

telegram

NO. WDS.	CL. OF SVC.	PD. OR COLL.	CASH NO.	CHARGE TO THE ACCOUNT OF	☐ OWLN NIGHT TELEGRAM
1	TLG		2-5-70	KF	UNLESS BOX ABOVE IS CHECKED THIS MESSAGE WILL BE SENT AS A TELEGRAM

Send the following message, subject to the terms on back hereof, which are hereby agreed to

Social Security Administration
Baltimore, Md.

Please do not stop payment to John D. Atkins, 2546 Military Rd N, Arlington, Va. 22207, SSN 246-12-5511.

your recent notice is in error. He does not have employment and is still totally disabled. Medical certificate being sent. It appears earnings have been posted to his account in error. Please advise me.

Joel T. Broyhill, M.C.

WU 1211 (R 5-69)

P
[83120 EVDAG

RECEIVED, APR 23, 11 07 AM, 70, GSA-REGION 3, TCS, COMMUNICATIONS

PAAULJAZ RUEVDKSD318 1131412-UUUU-RUEVDAG.

HWSS

FM ROBERT M BALL COMMISSIONER OF SOCIAL SECURITY
BALTIMORE MARYLAND

TO HONORABLE JOEL T. BROYHILL HOUSE OF REPRESENTATIVES WASHINGTON D C

BT

DO NOT PHONE

RE MR. JOHN D ATKINS, JR. 2546 MILITARY ROAD ARLINGTON VA 22207

CLM NUMBER 246 12 5511

IT HAS BEEN DETERMINED MR. ATKINS IS STILL DISABLED, WITHIN THE MEANING OF THE LAW. BENEFITS HAVE BEEN REINSTATED EFF 4-1-70. CK FOR $173.90 REPRESENTING HIS APRIL BENEFIT WILL BE SENT EARLY IN MAY.

BT

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21241

Refer to: 246-12-5511 HA
When Writing To:
Social Security Office
April 29, 1970

John D. Atkins Jr.
2546 Military Rd.
Arlington, VA 22207

We recently reviewed the evidence in your disability claim and find that you are still disabled. Therefore, your benefit payments will continue.

Your next social security check will be for $173.90. This represents payment through April 1970. You will receive this check shortly. After that, your check will be for $173.90 each month.

The evidence we have indicates your condition may improve in the future. Thus, we scheduled your claim for another review about September 1971. We will be in touch with you at that time, or earlier if you return to work. Please notify us promptly if you return to any type of work.

If you have questions about this notice or other social security matters, you should get in touch with your social security office. If you call in person, please take this notice with you.

Sincerely yours,

/s/ C. C. Hall
C. C. HALL
Assistant Director
Bureau of Disability Insurance

REALTORS SINCE 1908 TELEPHONE 536-9000

Date 5 April, 19 70

RECEIVED FROM John W. and Jean K. McDonald a deposit of
One Thousand Dollars ($ 1,000.00 Check ~~Note~~) to be applied as part payment of the purchase of Lot 614-C
the plan of 5th Add. to Lee Heights, Arlington County with improvements thereon known as 2546 North Military
Road, Arlington, Virginia, 22207, upon the following terms:

Total price of property Forty-Three Thousand Dollars ($ 43,000.00).

To be paid as follows: approx. Eight Thousand Dollars ($ 8,000.00),
~~h~~ at the date of conveyance, of which this deposit shall be a part.

The purchaser is to (~~give~~) conventional (place), a first deed of trust secured on the premises of approx. Thirty-Two Thousand
~~ollars~~ ($ 32,000.00), bearing interest at the rate of 8¼ % per annum, payable approx. $257.60 per month for
~~incipal~~ and interest for 25 years, plus taxes and insurance.

To secure the unpaid balance of the purchase price, the purchaser is to (give), (~~assume~~), a second deed of trust on the premises of approximately
Three Thousand Dollars ($ 3,000.00), bearing interest at the rate of Eight ~~Six~~ percent
~~r~~) ~~per~~ per annum, payable in monthly installments of principal and interest in the sum of Thirty-Six Dollars and Forty Cents
~~ollars~~ ($ 36.40), with prepayment privileges. ~~Unpaid balance due and payable five years from date of origin~~ Said trust will be fully amortized in ten (10) years.
~~ust~~ may be named by the parties secured thereby. Trustees in all deeds of

The property is sold free of encumbrance except as aforesaid; If water and/or sewer lines or other improvements have been installed and/or con-
~~cted~~ prior to the above date, charges for the installation or connection shall be paid by the seller; title is to be good of record subject, however, to
~~venants~~, conditions and restrictions of record, if any; otherwise, said deposit is to be returned and the sale declared off at the option of the purchaser,
~~less~~ there are title defects of such character that they may readily be remedied, but seller and agent are hereby released from all liability for damages
~~reason~~ of any defect in the title. In case steps are necessary to perfect the title, such action must be taken by the seller promptly at his own expense,
~~ereupon~~ the time herein specified for settlement by the purchaser will be extended for the period necessary for such action.

Examination of title, conveyancing, notary fees and all recording charges, including those for purchase money trust, if any, are to be at the cost
the purchaser; in the event the title should be found defective and irremediable, the seller hereby agrees to pay the cost of the examination of the
~~le~~ and also to pay the agent herein his commission just as though the sale had actually been consummated. All taxes, insurance, rents, and interest
~~e~~ to be prorated as of the date of settlement. If contract requires refinancing, seller agrees to pay necessary loan placement fee in excess of 1% paid
~~purchaser~~, if required by lender, however Seller will not pay in excess of 2% loan placement fee.

~~a~~ ~~within~~ 7/27/70 ~~days from the date of acceptance hereof by the owner~~, or upon completion of financing arrangements or as soon thereafter
a report on the title can be secured, the seller and purchaser agree to make full settlement in accordance with the terms hereof. If purchaser fails to
~~so~~, the deposit herein may be forfeited at the option of seller, in which event purchaser shall be relieved from further liability hereunder, or the
~~ller~~, at his option, may avail himself of any legal or equitable rights arising under this contract. In the event of forfeiture of deposit, agent shall be
~~titled~~ to one-half thereof as compensation for his services.

Seller agrees to give possession at time of settlement, and in the event he shall fail to do so he shall become and be thereafter a tenant by sufferance
the purchaser and hereby waives all notice to quit. The risk of loss or damage to said property by fire or other casualty until the deed of conveyance
recorded is assumed by the seller. Seller must locate and contract for a property to move to not later than
have settlement date by June 15, 1970.

~~The~~ seller agrees to pay to SHANNON & LUCIUS, the said agent, a sales commission of 6% of the gross purchase price. Entire deposit to be held
~~SHANNON~~ & LUCIUS, until settlement is made.

Seller guarantees ~~plumbing~~ air conditioning, electrical and heating systems, water heater, and all appliances shall be in good working condition as of settlement date. Seller
~~grees~~ to furnish purchaser a certificate of termite free condition at date of settlement.

Settlement is to be made at the office of agent or the attorney searching the title, and the deposit of the purchase money, the deed of conveyance
~~e~~ execution and such other papers as are required of either party by the terms of this contract shall be considered good and sufficient tender of per-
~~rmance~~ of the terms hereof. at the office of Mr. John E. Kilcarr, Arlington, Virginia.

Seller agrees to execute the usual general warranty deed, to be prepared at his expense, and to pay for the Virginia Revenue Stamps thereon.
~~If new VA or FHA financing is to be placed and necessary appraisals have not been ordered, purchaser agrees to pay for the required appraisal~~
~~f~~ the property.

Seller, at his expense, agrees to meet any and all FHA or VA requirements and/or conditions to qualify the property for the above loan.

If a new FHA insured first trust is to be placed, purchaser and seller each agree to the following:

It is expressly agreed that, notwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase
~~f~~ the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the seller has delivered to the pur-
~~aser~~ a written statement issued by the Federal Housing Commissioner setting forth the appraised value of the property for mortgage purposes of not
~~ss~~ than $ _____, which statement the seller hereby agrees to deliver to the purchaser promptly after such appraised value statement
~~made~~ available to the seller.

Purchaser and seller agree to promptly, diligently, and in good faith, commit those acts necessary to obtain the financing provided for herein.
~~If~~ any new financing is required, this contract is contingent upon its procurement.

If a new VA guaranteed first trust is to be placed and the veteran-purchaser is unable to obtain the aforementioned VA guaranteed loan, this
~~contract~~ shall be declared null and void and his deposit shall be refunded.

The above conditions apply equally when financing, other than VA financing, is required. When a new first trust is to be placed and the purchaser
~~unable~~ to obtain the new first trust after having made all reasonable efforts to do so, this contract shall be declared null and void and the deposit

dollars ($ 32,000.00), bearing interest at the rate of 8½ % per annum, payable approx. $257.60 per month for principal and interest for 25 years, plus taxes and insurance.

To secure the unpaid balance of the purchase price, the purchaser is to (give), (assume), a second deed of trust on the premises of approximately Three Thousand---------- Dollars ($ 3,000.00), bearing interest at the rate of Eight per cent (8%) per annum, payable in monthly installments of principal and interest in the sum of Thirty-Six Dollars and Forty Cents dollars ($ 36.40), with prepayment privileges. ~~Unpaid balance due and payable five years from date of origin~~ Said trust will be fully amortized in ten (10) years. Trustees in all deeds of trust may be named by the parties secured thereby.

The property is sold free of encumbrance except as aforesaid; If water and/or sewer lines or other improvements have been installed and/or connected prior to the above date, charges for the installation or connection shall be paid by the seller; title is to be good of record subject, however, to covenants, conditions and restrictions of record, if any; otherwise said deposit is to be returned and the sale declared off at the option of the purchaser, unless there are title defects of such character that they may readily be remedied, but seller and agent are hereby released from all liability for damages by reason of any defect in the title. In case steps are necessary to perfect the title, such action must be taken by the seller promptly at his own expense, whereupon the time herein specified for settlement by the purchaser will be extended for the period necessary for such action.

Examination of title, conveyancing, notary fees and all recording charges, including those for purchase money trust, if any, are to be at the cost of the purchaser; in the event the title should be found defective and irremediable, the seller hereby agrees to pay the cost of the examination of the title and also to pay the agent herein his commission just as though the sale had actually been consummated. All taxes, insurance, rents, and interest are to be prorated as of the date of settlement. If contract requires refinancing, seller agrees to pay necessary loan placement fee in excess of 1% paid by the purchaser, if required by lender, however Seller will not pay in excess of 2% loan placement fee.

It is agreed that ~~7/27/70 days from the date of acceptance hereof by the owner~~, or upon completion of financing arrangements or as soon thereafter as a report on the title can be secured, the seller and purchaser agree to make full settlement in accordance with the terms hereof. If purchaser fails to do so, the deposit herein may be forfeited at the option of seller, in which event purchaser shall be relieved from further liability hereunder, or the seller, at his option, may avail himself of any legal or equitable rights arising under this contract. In the event of forfeiture of deposit, agent shall be entitled to one-half thereof as compensation for his services.

Seller agrees to give possession at time of settlement, and in the event he shall fail to do so he shall become and be thereafter a tenant by sufferance of the purchaser and hereby waives all notice to quit. The risk of loss or damage to said property by fire or other casualty until the deed of conveyance is recorded is assumed by the seller. Seller must locate and contract for a property to move to not later than have settlement date by June 15, 1970.

The seller agrees to pay to SHANNON & LUCHS, the said agent, a sales commission of 6% of the gross purchase price. Entire deposit to be held by SHANNON & LUCHS, until settlement is made.

Seller guarantees plumbing and heating systems, water heater, and all appliances shall be in good working condition as of settlement date. Seller agrees to furnish purchaser a certificate of termite free condition at date of settlement. air conditioning electrical

Settlement is to be made at the office of agent or the attorney searching the title, and the deposit of the purchase money, the deed of conveyance for execution and such other papers as are required of either party by the terms of this contract shall be considered good and sufficient tender of performance of the terms hereof. Cr. John E. Kilcarr, Arlington, Virginia.

Seller agrees to execute the usual general warranty deed, to be prepared at his expense, and to pay for the Virginia Revenue/Stamps thereon.

~~If new VA or FHA financing is to be placed and necessary appraisals have not been ordered, purchaser agrees to pay for the required appraisal~~ of the property.

Seller, at his expense, agrees to meet any and all FHA or VA requirements and/or conditions to qualify the property for the above loan.

If a new FHA insured first trust is to be placed, purchaser and seller each agree to the following:

It is expressly agreed that, notwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the seller has delivered to the purchaser a written statement issued by the Federal Housing Commissioner setting forth the appraised value of the property for mortgage purposes of not less than $ _____, which statement the seller hereby agrees to deliver to the purchaser promptly after such appraised value statement is made available to the seller.

Purchaser and seller agree to promptly, diligently, and in good faith, commit those acts necessary to obtain the financing provided for herein. If any new financing is required, this contract is contingent upon its procurement.

If a new VA guaranteed first trust is to be placed and the veteran-purchaser is unable to obtain the aforementioned VA guaranteed loan, this contract shall be declared null and void and his deposit shall be refunded.

The above conditions apply equally when financing, other than VA financing, is required. When a new first trust is to be placed and the purchaser is unable to obtain the new first trust after having made all reasonable efforts to do so, this contract shall be declared null and void and the deposit shall be returned, and no commission shall be due and payable to the agent.

This contract shall be binding upon the principals and their respective heirs, executors, administrators or assigns, and, when ratified by the seller, shall contain the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements or representations, oral or written, not herein contained. Seller may remove all drapes and drape rods and window shade panels in Living Room and Dining Room.

The following articles, now on the premises, shall be included in the above price: range, two refrigerators, portable dishwasher, disposal, central air conditioning system, power humidifier, electronic dust filter, washer, dryer, whatever wall-to-wall carpeting is now installed, all curtain rods and drape rods throughout the house, whatever window shades and blinds are now installed, except as stated above.

REALTORS ADCO

SHANNON & LUCHS

By /s/ Leonard R. Honnold Agent (SEAL)

We, the undersigned, hereby ratify, accept and agree to the above memorandum and acknowledge it to be our contract.

5 April, 1970

/s/ John W. McDonald Purchaser (SEAL)

/s/ Jean K. McDonald Purchaser (SEAL)

8 April, 1970

/s/ John D. Atkins, Jr. Seller (SEAL)

/s/ Martha R. Atkins Seller (SEAL)

REC 776 1/8/70 Certified a True Copy of Original Contract. [signature] Notary Public

My Commission Expires: Commission Expires 11/12/72

[*Title Omitted in Printing*]

AFFIDAVIT IN SUPPORT OF COMPLAINT IN INTERVENTION AND MOTION FOR A PRELIMINARY INJUNCTION

I, Martha Ruth Atkins, being first duly sworn, depose and say that I am 55 years of age, a citizen of the United States and a resident of Virginia since 1945. I have been married to John Dillard Atkins for 28 years and we have two adult children presently married and living elsewhere. My residence is located at 2546 Military Road, Arlington, Virginia.

I was formerly employed by the Federal Government for nine years and retired in July 1967 on total permanent disability under the Civil Service program. I have remained in that status continually from that time and am currently receiving civil service disability benefits as a total permanently disabled individual.

In March 1965, I was diagnosed, at the Bethesda Naval Hospital Neuropsychiatric Ward, as a manic depressive and underwent psychotherapy from 1960 until 1968. I have further undergone intermittent psychotherapy since that time.

Due to my mental disorder, I am presently unable to work.

/s/ Martha Ruth Atkins
MARTHA RUTH ATKINS

SUBSCRIBED AND SWORN TO before me this 16th day of June 1970.

/s/ Dorothy R. Cox
Notary Public, VA.

My commission expires March 25, 1973.

[*Certificate of Service Omitted in Printing*]

AFFIDAVIT IN SUPPORT OF COMPLAINT IN INTERVENTION AND MOTION FOR A PRELIMINARY INJUNCTION

I, John Dillard Atkins, Jr., being first duly sworn, depose and say that I am fifty-three years of age, a citizen of the United States and a resident of Virginia since 1945. I have been married to Martha Ruth Atkins for 28 years and we have two adult children presently married and living elsewhere. My domiciliary residence is located at 2546 Military Road, Arlington, Virginia, where my wife currently resides. My present residence is located in the Veterans Administration lodge, 542 Walnut Avenue, S.W., Roanoke, Virginia.

I am presently a patient in the Veterans Administration hospital in Salem, Virginia where I have been hospitalized continuously from January 15, 1969. On July 18, 1969, the hospital sent me to the Veterans Administration lodge (the lodge is a half-way house of sorts) on a trial visit, where I have remained until this time. I am still a patient of the Veterans Administration hospital in Salem, Virginia and, even though I am permitted to reside in the lodge, I have never been released. There are seven other residents in the lodge, all with psychiatric disorders. I was initially committed to the Veterans Administration Hospital in Salem, Virginia under a psychiatric diagnosis of extreme depression.

In December 1966, I applied for social security disability benefits and was awarded disability benefits in July 1967, after a six month waiting period.

My employment history began at 14 years of age when I commenced part time employment for the Atlantic and Pacific Tea Company. In 1934, at age 18, I began full time employment with the Civilian Conservation Corps and worked in that capacity until August 1936. At that time I enrolled at North Carolina State College at Raleigh, North Carolina and graduated with a Bachelors Degree in June 1940.

I entered the Marine Corps in July 1940 as a commissioned officer (second lieutenant). I remained on active status with the Marine Corps until April 1945. I did retire in 1943 because of a physical disability, but remained on

active duty until 1945. The disability was diagnosed, at the Norfolk Naval Hospital in Portsmouth, Virginia, as being psychiatric in nature and was apparently the same or a related disability to that which I am now suffering.

In July 1945, I began working for the Virginia Forrest Service and continued that employment until April 1947. In September 1947, I commenced teaching (mathematics) at a high school in Aldrie, Virginia. I completed the school year in June 1948 and at that time commenced a Masters Degree program at George Washington University. I attended George Washington University as a full time student and received a Master of Arts Degree in education in 1949.

In September 1949, I began work in the Arlington County School System as a teacher and continued employment in that capacity until December 1966. In the spring of 1966, I voluntarily entered Bethesda Naval Hospital in the neuro-psychiatric ward for approximately three months. In the fall of 1966, I began teaching again in Arlington County and continued until December 1966 when I entered the Veterans Administration (mental) Hospital at Perry Point, Maryland because of severe psychiatric problems. I remained at the hospital in Perry Point until January 7, 1969.

On January 8, 1969, I was committed by the Arlington County Court, Judge Dodge, to the Western State Hospital in Staunton, Virginia and later transferred, on January 18, 1969, to the Veterans Administration Hospital in Salem, Virginia, where I am still a patient at this time.

On April 10, 1967, my physician at the Veterans Administration Hospital, Perry Point, Maryland diagnosed me as essentially totally disabled. This diagnosis was confirmed by letter to the Virginia Supplemental Retirement System dated April 10, 1967. The prognosis was, in part, that it was highly unlikely that I could even reintegrate to a level that would qualify me to return to active teaching and that it was even inconsiderable that I would even be able to make a responsible social adjustment living outside of the psychiatric hospital. See Exhibit A attached to the complaint in intervention. This prognosis was made on the basis of continuous psychiatric treatment at the Perry Point Veterans Administration Hospital for approximately one year and a half (December 1966 until April 1967).

On January 5, 1970, Dr. Albert W. Moser (social security

psychiatrist) interviewed me for the purose of investigating to determine if I were eligible for continued disability. During this one hour interview, Dr. Moser read summaries on extracts of my original records for approximately twenty minutes and examined me for approximately thirty minutes. It appears that on the basis of this interview and examination I was notified by the Social Security Administration, on February 3, 1970, that the medical evidence in my case shows that my condition had improved to the extent that I was able to do substantial gainful employment in January 1970. Accordingly, the last disability benefit to which I was entitled was for the month of March 1970. Exhibit B attached to the complaint in intervention.

On February 4, 1970, I directed a letter to the Social Security Administration advising them that, contrary to their assertion that I was able to do substantial gainful work in January 1970, my last date of gainful employment was December 13, 1966 and that I am now and have continously been a patient at the Veterans Hospital, Salem, Virginia since January 16, 1969. I have, as of this date, never been discharged from that hospital. See Exhibit C attached to complaint in intervention.

On the day after receipt of the letter terminating my social security benefits, February 4, 1970, my wife contacted the office of Congressman Joel T. Broyhill, requesting some form of help. In response to our request, Congressman Broyhill sent a telegram on February 5, 1970 to the Social Security Administration advising them that I was totally disabled and requesting that his office be informed concerning my status. Exhibit D attached to complaint in intervention.

In support of this effort, I requested Dr. Robert H. Hickey, psychologist and Dr. John Garner, M.D., both located at the Veterans Administration Hospital to send letters to the Social Security Administration concerning my condition. Their letters indicated that I should never teach again but voiced no conclusion in respect to other forms of employment.

Shortly after receiving the letter of termination dated February 3, 1970, my wife telephoned the Social Security Administration in three different instances. In each instance she talked to a different person. On the last occasion, my wife explained to Commissioner's Ball's Assistant that if

we did not know if there was any chance of reinstatement or even reconsideration by April 1, 1970, we would have to sell our home. Thereafter my wife and I directed approximately ten letters to the Social Security Administration requesting information in regard to my status and whether I would be reinstated by April 1, 1970, without ever receiving any response or reply by the Administration other than a letter to Congressman Broyhill's office advising that my termination was under investigation, but failing to comment on whether or not a decision would be reached by the crucial terminating date of April 1, 1970.

On April 23, 1970, the Social Security Administration advised Congressman Broyhill by telegram that they had determined that I was still disabled within the meaning of the law. Exhibit E attached to the complaint for intervention. My condition and situation from January 1970, when the letter of termination on February 3, 1970 stated I was medically able to do substantial employment, until reinstatement on April 21, 1970, remained virtually the same. During this period I remained and am still a patient at the Veterans Administration Hospital, Salem, Virginia, residing in the Veterans Administration lodge as a mental patient. Nevertheless, I was forced to undergo the severe mental strain of fearing the imminent termination of my social security benefits by March 1970 without ever being assured by the Social Security Administration that my case would even be reconsidered or reviewed by that time.

On April 30, 1970, I received a letter from the Social Security Administration, dated April 29, 1970, advising that upon review of the evidence, I am still legally disabled. However, I was further advised that my case will again be reviewed about September 1971. Exhibit F attached to the complaint. It appears that I can again look forward, at that time, to the prospect of another possible termination, without a hearing and without even any assurance by law that my case will be reconsidered before by benefits are terminated. To live under such circumstances is difficult for a healthy individual, but for a person such as myself, suffering from a mental disorder resulting in extreme tension and severe depression, it is impossible.

The consequences of the Social Security Administration's determination to terminate my benefits as of March 1970 have been catastrophic. My total monthly income consists of

statutory benefits received from social security, V.A. compensation and Virginia State retirement. The prospective loss of my social security benefits would have seriously impaired my ability to maintain my current obligations. Consequently, my wife took a third trust on our house on March 17, 1970, with Shannon and Luchs Company, for $6,000.00 and sold our home on April 5, 1970, Exhibit G attached to the complaint for intervention.

/s/ John D. Atkins, Jr.
JOHN D. ATKINS, JR.

SUBSCRIBED AND SWORN to before me this 16th day of June 1970.

/s/ Dorothy R. Cox
Notary Public, VA.

My commission expires: March 25, 1973.

[*Certificate of Service Omitted in Printing*]

[*Title Omitted in Printing*]

DEFENDANT'S OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION AND TO JOIN AS PARTY PLAINTIFF AND DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR CERTIFICATION OF ACTION AS MAINTAINABLE AS A CLASS ACTION

John Dillard Atkins, Jr. (hereinafter "applicant") seeks to intervene in this action under Rule 24, F.R.Civ.P. Both plaintiff Radie P. Wright and applicant John D. Atkins, Jr., also seek to have this action declared a class action pursuant to Rule 23, F.R.Civ.P.

This action concerns the question of whether a recipient of disability benefits is entitled to an evidentiary hearing before his disability benefits are suspended under Title II of the Social Security Act.

Applicant, John D. Atkins, Jr., who has been receiving disability insurance benefits under Title II of the Social Security Act since 1967, received a letter dated February 3, 1970, from the Social Security Administration suspending his disability benefits effective April 1, 1970. The suspension was based on the fact that the "medical evidence in your case shows that your condition has improved to the extent that you became able to do substantial gainful employment in January 1970." This determination had apparently been made on the basis of an interview and examination conducted by a psychiatrist for the Social Security Administration on January 5, 1970. On April 29, 1970, after applicant had requested a reconsideration of the decision to suspend his disability payments, the Administration reinstated his benefits, commencing with his April 1970 check. Thus, applicant has received a disability check from the Social Security Administration for *every* month since 1967. The Administration also indicated in its letter that it had "scheduled your claim for another review about September 1971."

The defendant, Secretary of Health, Education and Welfare, asserts that the applicant's motion to intervene as a

plaintiff should be denied because his "claim . . . and the main action do not have a question of law or fact in common." Rule 24(b)(2), F.R.Civ.P.

As indicated in the preceding discussion, applicant has continued, and *still* is, receiving disability insurance benefits from the Social Security Administration since 1967. In the instant case, plaintiff Radie P. Wright's benefits were suspended, and plaintiff brought this action seeking a temporary restraining order preventing the Social Security Administration from *continuing* to suspend his benefits. The Court granted that motion on May 14, 1970. In applicant's case, he is *presently* receiving disability benefits, and therefore, applicant is not and will not suffer irreparable injury. Applicant further claims he faces the "prospective loss of social security income in *September 1971*" (emphasis supplied) and that he will suffer irreparable injury to his health. Such a claim is speculative and total conjecture on applicant's part. There is no indication whatsoever that the Social Security Administration will suspend his benefits in September 1971. It will only *review* his claim at that time.

Since there is no relief which this Court can give applicant at this time, and the factual situation in applicant's case is entirely different from that of the plaintiff, intervention should be denied. Furthermore, there is no "question of law in common," for as demonstrated above, there is no evidentiary hearing necessary in applicant's case since his benefits have already been restored.

For the foregoing reasons, applicant's motion to intervene should be denied.

The motions of the plaintiff and the applicant to certify this action as a class action should be denied because plaintiff and applicant do not meet the prerequisites to a class action. Rule 23(a), F.R.Civ.P. Two of the prerequisites are that there must be "questions of law or fact common to the class," Rule 23(a)(2), and "the claims . . . of the representative parties are typical of the claims . . . of the class . . .." Rule 23(a)(3).

As evidenced above, the facts in each particular disability suspension case are quite different. As in applicant's case, there may not be any legal question for the Court to decide. Thus the question of fact and law, if any, in applicant's case are *not* common to the class, and the claims of plaintiff and applicant are *not* typical of the claims of the

class. Plaintiff and applicant have not met the prerequisites of a class action. Rule 23(a), F.R.Civ.P.

For the foregoing reasons, applicant's motion to intervene as a plaintiff and the motions of plaintiff and applicant to certify this case as a class action should be denied.

/s/
THOMAS A. FLANNERY
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
LAWRENCE S. MARGOLIS
Assistant United States Attorney

[*Certificate of Service Omitted in Printing*]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RADIE P. WRIGHT, *et al.*, *Plaintiffs*, v. ROBERT H. FINCH, *Defendant.*	Civil Action No. 1457-70

[Filed, Aug 21, 1970 ROBERT M. STEARNS, *Clerk*]

ORDER

Upon consideration of the motion of John D. Atkins for leave to intervene as party-plaintiff and upon further consideration of the application of plaintiff Radie P. Wright for leave to maintain his action as a class action under Rule 23(b)(2), Fed. R. Civ. P., it is by the Court this 21st day of August, 1970.

ORDERED that the motion to intervene be and the same hereby is granted under the provisions of Rule 24(b), and it is further

ORDERED that the application of plaintiff Radie P. Wright that the action be maintained as a class action be and the same hereby is granted under the provisions of Rule 23(b)(2), Fed. R. Civ. P.

/s/ Oliver Gasch
Judge

[*Title Omitted in Printing*]

AFFIDAVIT OF BERNARD POPICK

STATE OF MARYLAND
COUNTY OF BALTIMORE } ss

I, Bernard Popick, being duly sworn, depose that I am Director of the Bureau of Disability Insurance of the Social Security Administration. In my official capacity I have legal custody of certain records, documents, and other information established and maintained by the Department of Health, Education, and Welfare, pursuant to Title 42, United States Code, section 405.

Section 205(a) of the Social Security Act, as amended, 42 U.S.C.A., section 405(a) provides that:

> "The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."

Section 221(a), of the Social Security Act, 42 U.S.C. 421(a), provides in pertinent part:

> "(a) In the case of any individual, the determination of whether or not he is under a disability * * * and of the day such disability began, and the determination of the day on which such disability ceases, shall * * * be made by a State agency pursuant to an agreement entered into under subsection (b). * * * any such determination shall be the determination of the Secretary for purposes of this title.
>
> * * * * *
>
> "(c) The Secretary may on his own motion review a determniation, made by a State agency pursuant to an agreement under this section, that an individual is under a disability * * *."

Social Security Administration Regulations No. 4, section 404.1527, 20 C.F.R. 1527, promulgated by the Secretary pursuant to the statutory authority of section 205(a) of the Act, supra, provides:

"Upon reasonable notice of the time and place thereof, any individual alleged to be under a disability shall present himself for and submit to physical or mental examinations or tests, at the expense of the Administration, by a physician or other professional or technical source designated by the Administration or the State agency authorized to make determinations as to disability. If any such individual fails or refuses to present himself for any examination or test, such failure or refusal, unless the Secretary determines that there is good cause therefor, shall be a basis for determining that such individual is not under a disability. Religious or personal scruples against medical examination or test shall not excuse an individual from presenting himself for a medical examination or test."

Social Security Administration Regulation No. 4, section 404.1528, 20 C.F.R. 404.1528, provides:

"An individual for whom a period of disability has been established or who has been determined to be entitled to disability insurance benefits or to child's widow's or widower's insurance benefits based on disability, upon reasonable notice, shall, if requested to do so, present himself for and submit to examinations or tests as provided in § 404.1527, and shall submit medical reports and other evidence necessary for the purpose of determining whether such individual continues to be under a disability.

Social Security Administration Regulations No. 4, section 404.1531, 20 C.F.R. 404.1531 provides:

"An individual for whom a period of disability has been established or who is entitled to disability insurance benefits or to child's, widow's or widower's insurance benefits based on disability, shall notify the Administration promptly if:

"(a) His condition improves;

"(b) He engages in any work activity or there is an

increase in the amount of such activity or his earnings therefrom; or

"(c) He has been in a hospital or similar institution and is discharged therefrom."

Social Security Administration Regulations No. 4, section 404.1539, 20 C.F.R. 404.1539 provides in pertinent part:

"Where it has been determined that an individual is under a disability * * * the 'disability' shall be found to have ceased:

"(a) In the case of an individual entitled to disability insurance benefits or child's insurance benefits based on disability, in the earlier of the following:

"(1) The month in which the impairment, as established by the medical or other evidence, is no longer of such severity as to prevent him from engaging in any substantial gainful activity or, in the case of disability under § 404.1501(a)(1)(ii), no longer constitutes statutory blindness; or

"(2) The month in which the individual has regained his ability to engage in substantial gainful activity, or, in the case of disability under § 404.1501(a)(1)(ii), to utilize in substantial gainful activity skills or abilities comparable to those of some gainful activity in which he had previously engaged with some regularity over a substantial period of time, as demonstrated by work activity after application of the provisions in § 404.1536; * * *."

I have examined the files maintained by the Social Security Administration pertaining to John D. Atkins, Jr. Social Security Account Number 246-12-5511, and have ascertained the following:

(1) John D. Atkins, Jr. applied for disability insurance benefits on May 2, 1967, alleging disability beginning December 11, 1966, by reason of a mental impairment. This claim was allowed by the Social Security Administration pursuant to a determination dated August 17, 1967. Although disability was established beginning in December 1966 cash benefits were not payable until July 1967; this is because section 223 of the Social Security Act (42 U.S.C. 423) imposes a "waiting period" of six consecutive calen-

dar months of disability before cash benefits are payable. Monthly benefits were mailed to John D. Atkins, Jr. at the VA Hospital, Perry Point, Maryland where Mr. Atkins was at that time a patient. Mr. Atkins was advised at the time he applied for benefits that discharge from the hospital might be reason for re-evaluating his entitlement to disability benefits.

(2) In September 1969, when John Atkins' August, 1969 benefit check was returned from the Perry Point Hospital as undeliverable, the Administration began a continuing disability investigation in accordance with Social Security Regulations No. 4, section 404.1528, supra. This investigation was conducted by the Towson, Maryland Social Security Office. At that time the disability claim folder (i.e. a folder containing all pertinent documents on any given social security claim) was forwarded by the Social Security Administration Bureau of Disability Insurance, Baltimore, Maryland, to the Towson, Maryland District Office. The Perry Point Hospital advised the Administration that Mr. Atkins had been discharged January 7, 1969. On October 30, 1969 Mr. Atkins' wife advised that Mr. Atkins was a patient at the VA Hospital in Salem, Virginia but living as an outpatient with seven other patients at 542 S.W. Walnut Avenue, Roanoke, Virginia.

(3) A Social Security Administration representative interviewed Mr. Atkins on November 7, 1969. Mr. Atkins told the interviewer that after leaving the Perry Point Hospital on January 7, 1969, he entered the Western State Hospital, Staunton, Virginia, and later entered the VA Hospital in Salem on January 18, 1969. Mr. Atkins further stated that on July 22, 1969 he left the Salem Hospital on "trial visit" status and currently resided with seven other patients at the Roanoke, Virginia address as part of a therapy and treatment program sponsored by the hospital. At this time Mr. Atkins requested on a standard Social Security Administration form used for this purpose, that his checks be mailed to his home address in Arlington, Virginia.

(4) The Bureau of Disability Insurance, Baltimore, Maryland then forwarded its disability claim folder on this claim to the Virginia State Agency for a determination of continuing disability. This agency obtained medical evidence from the Western State Hospital and the Salem Hospital and arranged for a consultive psychiatric exami-

nation of Mr. Atkins, as it was authorized to do by Social Security Regulations No. 4, section 404.1527, supra. Mr. Atkins was advised of this scheduled examination (to be conducted by Dr. Albert Moser) by letter dated December 18, 1969. Mr. Atkins at first objected to the examination by Dr. Moser, but, after discussing it further with Administration representatives on December 29, 1969 and with Dr. Hickey, his psychologist at the Salem Hospital, on December 31, 1969, Mr. Atkins agreed to the examination. The examination was conducted on January 5, 1970. Based on the medical evidence obtained from the Salem VA Hospital, the Western State Hospital and on the report submitted by Dr. Moser, the Virginia State Agency determined on January 16, 1970 that the plaintiff's disability had ceased as of January, 1970. This determination was reached on the ground specified in Social Security Regulation 404.1539 (a)(1), supra, i.e. that medical and other evidence showed that the medical impairment was no longer of such severity as to prevent the claimant from engaging in substantial gainful activity. The disability folder in this case was returned to the Bureau of Disability Insurance, Baltimore, Maryland, the same date.

(5) While the investigation of continuing disability was being made, which required that the disability claim folder containing Mr. Atkins' records be in the investigating offices, Mr. Atkins had written two letters dated September 8, 1969, and September 27, 1969, requesting that his address for purposes of receiving his monthly checks be changed from the Perry Point Veterans Administration Hospital to his home address in Arlington, Virginia. On October 13, 1969, Mr. Atkins completed a standard Social Security Administration questionnaire requesting re-issuance of his August and September checks. On October 26, 1969 he again requested that the two checks be mailed to him at his home address in Arlington, Virginia. On October 25, 1969 the Alexandria, Virginia Social Security Office notified the Social Security Bureau of Disability Insurance in Baltimore that Mr. Atkins had not received his August and September checks. The case was designated "critical" and the search was made for the disability folder, since changes in payment actions normally require the presence of the claims folder. On December 8, 1969, the disability claim folder was located in the Virginia State Agency and special procedures were

undertaken to pay the August and September checks without the claim folder. The combined checks were sent to Mr. Atkins on December 11, 1969.

(6) On January 29, 1970 the Bureau of Disability Insurance approved the Virginia State Agency's determination that because Mr. Atkins' disability had terminated on January 29, 1970 his disability benefits must be terminated as of the end of March, 1970. This decision was made pursuant to section 223(a) of the Social Security Act, 42 U.S.C. 423(a), which provides that entitlement to disability insurance benefits ends with the third month following the month in which disability ceases. Thus under the Administration's decision Mr. Atkins' benefits were payable through March, 1970. Mr. Atkins was notified of the Administration's decision to terminate his benefits by letter dated February 3, 1970 mailed to his Arlington, Virginia address. In this letter Mr. Atkins was notified of his right to a formal reconsideration of his claim as proved in Social Security Administration Regulations No. 4, section 404.911, 20 C.F.R. 404.911 and his right to submit additional evidence in support of his claim. On February 4, 1970, Mr. Atkins wrote to the Administration stating reasons why he believed his disability had not terminated, requesting formal reconsideration, and advising that he intended to submit additional evidence (medical reports from the Salem Hospital). Also on February 4, 1970, Mr. Atkins' wife called the Bureau of Disability Insurance, Baltimore, to report that Mr. Atkins was still in the hospital and was not working. On February 5, 1970, Bureau of Disability Insurance personnel telephoned the Arlington, Virginia Social Security Office and ascertained that the claimant was still residing in Roanoke, Virginia while his wife remained in Arlington, Virginia. After considering the statements of Mr. Atkins and his wife and the information obtained from the Arlington Social Security Office, a second letter notifying the claimant that his benefits would end after March, 1970 was mailed on February 11, 1970 to Mr. Atkins' Roanoke address. (This letter was not a denial of Mr. Atkins' request for formal reconsideration but rather reiterated the Administration's earlier notification that benefits would be terminated and that Mr. Atkins could have this decision reconsidered.)

(7) On February 5, 1970 Congressman Joel T. Broyhill

telegraphed the Social Security Administration, Bureau of Disability Insurance, Baltimore, Maryland questioning its determination to terminate Mr. Atkins' disability benefits. On February 13, Social Security Administration personnel explained the Administration's decision by telephone to a member of Congressman Broyhill's staff. On March 5, 1970, the Administration mailed a letter to Congressman Broyhill confirming and supplementing this telephone conversation. It was necessary for the Bureau of Disability Insurance to retain Mr. Atkins' disability claim folder containing all documents in this case until the March 5, 1970 correspondence to Congressman Broyhill was completed so that his inquiries might be satisfactorily answered.

(8) The disability claim folder was then forwarded to the Roanoke, Virginia Social Security Office in order that that office could contact Mr. Atkins, supply him with a more detailed explanation of the decision to terminate his benefits and also to offer him the opportunity to submit any evidence he wished in support of his claim. When this was done the claim folder was then forwarded to the Virginia State Agency so that pursuant to Mr. Atkins' request they might formally reconsider their decision to terminate his disability benefits. Meanwhile the Virginia State Agency had received additional evidence consisting of a letter dated February 16, 1970, signed by Dr. Hickey, clinical psychologist at the Salem Hospital. This letter noted that Mr. Atkins' illness still compelled him to live in a sheltered situation and that at the hospital half-way home where he lived in Roanoke he received room and board, but no other remuneration in return for handling the payment of patients' bill and counseling other former patients. After considering this evidence and statements submitted by Mr. Atkins himself dated March 20, 1970, March 21, 1970 and April 14, 1970 and weighing this additional evidence in light of indications in Dr. Moser's report that remission of Mr. Atkins' illness was only partial, the Virginia State Agency determined that Mr. Atkins continued to be disabled and that its previous decision terminating disability benefits as of the end of March, 1970 should be reversed. This decision was made April 1, 1970, and approved by the Bureau of Disability Insurance in Baltimore April 15, 1970.

(9) As a result of the State Agency's decision to continue benefits, the April benefit was paid to Mr. Atkins in May.

1970. Since a benefit for a given month is always actually paid the following month, Mr. Atkins received his April benefit on time and there was no break whatsoever in the continuity of benefit payments to him. Mr. Atkins is currently being paid benefits.

(10) By letter dated April 29, 1970 the Bureau of Disability Insurance notified Mr. Atkins that his disability benefits were being continued. Mr. Atkins was also advised that his case would be re-evaluated in September, 1971 to determine whether his disability still continued. Then in response to inquiries by Mr. Atkins and Congressman Broyhill it was explained that such re-evalnation of Mr. Atkins' condition was scheduled for September 1971 because his condition was one which could reasonably be expected to improve by September, 1971. The decision to re-evaluate at that time is consistent with the applicable law. Social Security Administration Regulations No. 4, section 404.1528, supra.

/s/ Bernard Popick
BERNARD POPICK
Director, Bureau of Disability Insurance

Subscribed and sworn to before
me this 24th day
of August 1970.

/s/ Wilson R. Touler
Notary Public
My Commission expires July 1, 1974

United States District Court for the District of Columbia

(Civil Action No. 1457-70)

RADIE WRIGHT, ET AL., PLAINTIFFS

v.

ROBERT H. FINCH, DEFENDANT

Before ROBB, Circuit Judge, MATTHEWS, Senior District Judge, and GASCH, District Judge.

GASCH, District Judge: This class action [1] was initiated by plaintiff Radie Wright in behalf of all recipients of disability insurance benefits under Title II of the Social Security Act.[2] Radie Wright suffers from chronic gastritis, cirrhosis of the liver, hepatic decompensation arthritis and a heart condition. He was advised by his doctors that he could no longer work as a laborer because of his condition and his application for disability payments was approved by the Social Security Administration in May, 1966. Since that time he has drawn various amounts for his support and the support of his wife and two sons; his current payments are $126.70 per month for his own support plus smaller amounts for the support of his sons. In 1968, while still drawing benefit pay-

[1] The situation presented here meets the criterion of a class action maintainable under Rule 23(b)(2), Fed. R. Civ. P.

[2] 42 U.S.C. §§ 401 *et seq.* (1964).

ments, he returned to work and earned $343.32; he continued to work in 1969 and earned $4,098.49. He has not worked since December, 1969. The Administration checks earnings postings against the rolls of disability beneficiaries. This check revealed that Radie Wright had been employed. Following additional field investigation, including verification of the earnings with the employers and an interview with plaintiff, the Administration determined that because he had demonstrated ability to engage in substantial gainful activity that Radie Wright might no longer be eligible for disability payments. He was notified by letter on April 14, 1970, that his payments were being suspended as of that time pending further investigation of his eligibility.[3]

Intervenor-plaintiff, John D. Atkins, Jr., is currently a psychiatric patient of the Veterans Administration Hospital in Salem, Virginia. He has been under psychiatric care since December, 1966, and was found eligible for disability benefits by the Administration in July, 1967. He was informed by letter on February 3, 1970, that it had been determined that his disability had ceased as of January, 1970, apparently on the basis of an examination of the recipient and his medical records conducted by a doctor for the Social Security Administration in January, 1970. His benefits were to be terminated after the March, 1970, payment. This decision was subsequently reconsidered and Atkins was reinstated by the Administration. He is still subject to the suspension provisions of the Act.

Plaintiffs contend that section 225 of the Act[4] is unconstitutional in that it deprives them of property

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[3] The notice given plaintiff was a form notice which explained that his benefit payments had been stopped because "your trial work period expired."

[4] *Id.*, § 425.

without due process of law.[5] That section of the Act provides:

> If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to [disability] benefits . . . may have ceased to be under a disability, the Secretary may suspend the payment of benefits . . . until it is determined . . . whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased.

In its recent decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the Supreme Court held that an evidentiary hearing was required prior to terminating welfare benefits under Title IV of the Act. The challenged section quoted above must similarly be held constitutionally deficient in that disability payments may be suspended without prior proceedings in which the recipient may participate.

I.

In *Goldberg* and the companion case of *Wheeler* v. *Montgomery*,[6] the Supreme Court has declared that benefits received under Title I (Old Age Assistance) and Title IV (Aid to Families with Dependent Children) of the Social Security Act are a matter of statutory entitlement for persons qualified to receive them.[7] Therefore, suspension or termination of these benefits are subject to the requirements of procedural

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[5] Since plaintiffs seek an injunction restraining the enforcement of an act of Congress due to an alleged constitutional defect, a three-judge court was convened pursuant to 28 U.S.C. §§ 2282, 2284 (1964).

[6] 397 U.S. 280 (1970).

[7] 397 U.S. 262.

due process. There is no significant difference between entitlement to those benefits and benefits under Title II (Old Age, Survivors and Disability Insurance Benefits).[8] It follows that disability beneficiaries must be accorded procedural due process in suspension and termination proceedings.[9]

II.

The exact procedures demanded by due process are determined by the circumstances of the particular situation. The determination of the appropriateness of the procedures requires balancing the governmental function involved against the private interest affected." The Court stated the test in *Goldberg*: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[10] In *Goldberg*, the crucial factor was that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live

[8] Eligibility for Title I and Title IV benefits is based on the need of the recipient whereas Title II benefits are paid to individuals who are insured under the Act and meet the age or disability requirements. 42 U.S.C. §§ 402, 423 (1964). This distinction is not significant in determining the procedural rights of the recipient. *See* text accompanying note 12, *infra*.

[9] *See Flemming v. Nestor*, 363 U.S. 603 (1960). "The interest of a covered employee under the [Social Security Act] is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.*, at 611.

[10] *See, e.g., Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

[11] 397 U.S. 262–63 (citations omitted).

while he waits."[12] This factor may not be as great in the case of a disability beneficiary as it is in the welfare recipient's situation. Disability beneficiaries are not, as are welfare recipients, dependent by definition on benefit payments for their livelihood. But a disability beneficiary is by definition unable to engage in substantial gainful activity and he would, therefore, be liable to sustain grievous loss while awaiting the resolution of his claim.

The countervailing governmental interests raised in support of the summary procedures are the protection of the Federal Disability Trust Fund from depletion due to payments to ineligible recipients pending determination of their status and the administrative expense involved in providing pre-termination review. These fiscal and administrative expenses to the government, whatever their magnitude, are insufficient justification considering the crippling blow that could be dealt to an individual in these circumstances. It is precisely this type of balance which led the *Goldberg* Court to require pre-termination review.

The ex-parte suspension power granted to the Secretary by section 225 is summary adjudication that is inconsistent with the requirements of due process. A disability beneficiary must be given adequate notice and an opportunity to participate in the determination proceedings prior to the suspension of benefits.

III.

The Supreme Court concluded that a "fair hearing" for welfare recipients must include timely and adequate notice, an opportunity for the recipient to present his case orally and the right to confront and cross-examine adverse witnesses. In determining the

[12] *Id.*, at 264.

type of hearing necessary, the Court relied on its previous holding in *Greene* v. *McElroy*.[13]

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, *it is even more important where evidence consists of the testimony of individuals whose memory might be faulty or who in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.* We have formalized these protections in the requirements of confrontation and cross-examination.[14]

The evidentiary basis for the determination of eligibility for welfare benefits which was considered by the Court in *Goldberg* in delineating the form of hearing required in that case differs from the situation presented here. The regulations[15] of the Social Security Administration provide that disability benefits can be terminated when medical or other evidence indicates that the impairment has ceased or when the individual has engaged in substantial gainful employment. The evidence to support these findings consists of medical reports and certification by employers

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[13] 360 U.S. 474 (1957).

[14] *Id.*, at 496 (emphasis added).

[15] 20 C.F.R. § 404.1539.

that the individual has been employed by them.[16] If timely notice is given the recipient specifying the grounds for his proposed suspension and he is given reasonable opportunity to examine the documentary evidence supporting the action, there would be no necessity to hold a formal hearing where the medical personnel or the employers would have to be made available for cross-examination. The affected recipient should of course be given the opportunity to respond and submit evidence supporting his claim. The resolution of conflicting evidence at this point should be made by an impartial decision maker.[17] If the recipient has submitted some evidence that contradicts that possessed by the Administration, a hearing could be held to resolve those issues. The Social Security Administration should have an opportunity to develop presuspension proceedings[18] which afford

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[16] The Bureau of Data Processing and Accounts of the Social Security Administration which maintains earnings records of all individuals covered under the Act, checks earnings posted against the rolls of disability beneficiaries. The Administration's Claims Manual instructs field personnel to contact employers for whom the disability beneficiary has worked while receiving benefits. Further, section 6708 of the Manual states that "benefits should not be suspended based solely on a report from an informant."

[17] The investigating officer who has compiled the record on which the decision is to be based should not make the final decision.

[18] The Secretary has formulated procedures for determining and reviewing rights with respect to the establishment and continuance of a period of disability. 20 C.F.R. Part 404, subpart J. These review procedures only become applicable after the administrative decision that the disability has ceased, 20 C.F.R. § 404.905(d), but could form a basis for the presus-

fundamental due process to the recipient before this Court rules on the adequacy of the details of that procedure."

I am authorized to state that Circuit Judge Robb concurs in this opinion.

OLIVER GASCH,
Judge.

JANUARY 6, 1971.

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pension proceedings which this decision requires. These regulations require that when an initial determination is made that the party to whom the determination applies be notified of the determination, of the basis of the determination, and informed of his right to request reconsideration. 20 C.F.R. § 404.907. The party may submit additional material for the purposes of the reconsideration. After initial determination and reconsideration, the individual has a right to a hearing before an impartial hearing examiner. 20 C.F.R. § 404.916. These regulations do not now apply to actions under 42 U.S.C. § 425, since suspension of benefits pending an investigation of continued eligibility is not an initial determination under the regulations. 20 C.F.R. § 404.906.

[15] The Supreme Court in *Goldberg* recognized "the importance of not imposing upon the . . . government . . . any procedural requirements beyond those demanded by rudimentary due process." 397 U.S. at 267. *See also* the dissenting opinion of Mr. Chief Justice Burger in *Wheeler* v. *Montgomery*, 397 U.S. 282 (1970).

MATTHEWS, Senior District Judge (concurring and dissenting in part): I concur in large part in the opinion, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970; *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970). In *Goldberg* the Supreme Court held that a welfare recipient, in addition to timely and adequate notice detailing the reasons for a proposed termination of benefits, must have "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Page 268. I respectfully dissent from so much of the opinion as seems to suggest that the procedural requirements of due process may be satisfied with something less than the "opportunity" specified in *Goldberg*.

BURNITA SHELTON MATTHEWS,
United States Senior District Judge.

United States District Court for the District of Columbia

(Civil Action No. 1457-70)

RADIE WRIGHT, ET AL., PLAINTIFFS

v.

ROBERT H. FINCH, DEFENDANT.

ORDER

Pursuant to the opinion filed in this case on January 6, 1971, which opinion is adopted as the Court's Findings of Fact and Conclusions of Law, it is by the Court this 12th day of February, 1971,

ORDERED that Section 225 of the Social Security Act be and it is hereby declared unconstitutional and void in that it denies recipients procedural due process in suspension proceedings, and it is further

ORDERED that plaintiff Radie Wright continue to receive Social Security Disability benefits until such time as his eligibility is suspended in accordance with the procedures outlined in the Opinion of January 6, 1971, and it is further

ORDERED that no Social Security Disability beneficiary be suspended without being afforded adequate notice and an opportunity to participate in the determination proceedings, and it is further

ORDERED that the Social Security Administration promulgate regulations governing the suspension of disability benefits to recipients which shall conform

to the requisites of procedural due process as outlined in the Opinion filed in this case, and it is further

ORDERED that plaintiffs' motion for summary judgment be and it is hereby granted to the extent reflected by the foregoing orders, and it is further

ORDERED that defendant's motion for summary judgment be and it is hereby denied.

OLIVER GASCH,
Judge.

[*Title Omitted in Printing*]

MOTION FOR STAY PENDING APPEAL

Defendant, by his undersigned attorneys, pursuant to Rule 62(a) of the Federal Rules of Civil Procedure, respectfully moves that the Court's Order dated February 12, 1971, declaring Section 225 of the Social Security Act to be unconstitutional and ordering that no social security disability beneficiary be suspended without being afforded adequate notice and an opportunity to participate in the determination proceedings, be stayed pending defendant's appeal therefrom.

In support of this motion, the Court is respectfully referred to the memorandum filed herewith.

Respectfully submitted,

/s/
L. PATRICK GRAY, III
Assistant Attorney General

/s/
THOMAS A. FLANNERY
United States Attorney

/s/
HARLAND F. LEATHERS

/s/
DAVID EPSTEIN
Attorneys, Department of Justice
Attorneys for Defendant

[*Title Omitted in Printing*]

OPPOSITION TO MOTION FOR STAY PENDING APPEAL

Plaintiffs, by their undersigned attorneys, respectfully oppose defendant's motion to stay the Court's Order dated February 12, 1971 pending appeal therefrom.

Plaintiffs have stated grounds for their opposition in a memorandum filed herewith, and respectfully refer the Court to that memorandum.

Respectfully submitted,

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Attorneys for Plaintiffs

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NOTICE OF APPEAL

Notice is hereby given that all plaintiffs and intervenor-plaintiff hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the final order of the Court entered in this section on the 12th day of February, 1971.

/s/ Edward E. Schwab
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NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the order of this Court entered February 12, 1971, in favor of the plaintiffs and against the defendant.

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
Assistant United States Attorney.

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RADIE WRIGHT, *et al.*, *Plaintiffs*, v. ROBERT H. FINCH, *Defendant.*	Civil Action No. 1457–70

[Filed Mar. 24, 1971, JAMES F. DAVEY, *Clerk*]

ORDER

Upon consideration of defendant's motion for stay pending appeal and the opposition thereto, it is by the Court this 24th day of March, 1971,

ORDERED that the Order of February 12, 1971, be and it is hereby stayed pending appeal, *provided* that plaintiff Radie Wright continue to receive Social Security Disability benefits until such time as his eligibility is suspended in accordance with the procedures outlined in the Opinion of January 6, 1971.

/s/ Roger Robb
Circuit Judge

/s/ Burnita Shelton Matthews
Senior District Judge

/s/ Oliver Gasch
District Judge

SUPREME COURT OF THE UNITED STATES

Nos. 70-161 and 70-5211

ELLIOT L. RICHARDSON, *Secretary of Health, Education and Welfare,*

Appellant,

v.

RADIE WRIGHT, *et al.;* and

RADIE WRIGHT, *et al.,*

Appellants,

v.

ELLIOT L. RICHARDSON, *etc.*

APPEALS from the United States District Court for the District of Columbia.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument.

October 12, 1971

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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-161

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

RADIE WRIGHT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. —

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

v.

RADIE WRIGHT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A 15–23) is reported at 321 F. Supp. 383.

JURISDICTION

The order of the district court declaring 42 U.S.C. 425 unconstitutional was entered on February 12, 1971 (App. B 24–25). A notice of appeal was filed on March 12, 1971 (App. C 26). The jurisdiction of this Court is conferred by 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Section 225 of the Social Security Act, under which disability benefit payments are suspended

on the basis of objective evidence but without a hearing, is constitutional.

STATUTES AND REGULATIONS INVOLVED

Section 225 of the Social Security Act, 79 Stat. 373, as amended, 42 U.S.C. (Supp. V) 425, and the relevant Department of Health, Education and Welfare regulations, are set forth in Appendix D, *infra* 27–29.

STATEMENT

Appellee Radie Wright is a social security disability beneficiary who had his benefit payments suspended under Section 225 of the Social Security Act, 42 U.S.C. (Supp. V) 425, because he had returned to work and had engaged in substantial gainful employment, thus rendering him ineligible for further benefits.[1] He instituted this class action for review of the administrative decision, seeking a declaration that Section 225 is unconstitutional. This is a direct appeal from an order of the three-judge district court holding Section 225 unconstitutional and enjoining its operation.

Section 225 provides that the Secretary may suspend[2] disability benefit payments to an individual if he receives information leading him to believe the individual is no longer disabled. Upon receiving such

[1] Under Section 223(d)(1) of the Social Security Act, 42 U.S.C. (Supp. V) 423(d)(1), disability is defined as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." The Act further provides that any person who is actually engaged in substantial gainful activity cannot qualify as disabled. 42 U.S.C. (Supp. V) 423(d)(4).

[2] Benefits are *suspended* by a letter so advising the beneficiary before a determination is made whether disability has ceased. Disability benefits are *terminated* for death, attainment of age

information the Secretary may proceed by instructing the local district office of the Social Security Administration to investigate further;[3] the district office may then forward the results of its investigation to the appropriate State agency for a recommendation whether suspension would be justified.[4] The State agency's recommendation is reviewed by the Social Security Administration's Bureau of Disability Insurance, which is located in Baltimore, Maryland, and if suspension is ordered, the beneficiary is promptly notified.

The appropriate State agency is also notified and termination proceedings are begun, if these have not already commenced, in order to determine whether the individual's disability has ceased. 42 U.S.C. (Supp. V) 421(a). A State agency's determination that the beneficiary is no longer disabled must be supported by specific findings and conclusions and is subject to review and reconsideration by the Bureau of Disability Insurance in Baltimore. 42 U.S.C. (Supp. V) 421(c); 20 C.F.R. 404.905(d); 20 C.F.R. 404.909. When suspension has not already been ordered, this may be done while the State agency's

---

65, attainment of age 18 or 22 for benefits to dependent children, or cessation of disability. 42 U.S.C. 402(d)(1)(B), 423(a)(1)(D). Cessation of disability is demonstrable either by medical evidence or by evidence of earnings derived from substantial gainful activity.

[3] Prior to August 1970, this procedure was always followed if the information received by the Secretary consisted of wage postings. After that date, however, because of overburdened district offices, the Secretary instituted an experimental procedure whereby the recipient is notified by mail and asked to verify his earnings, explain the surroundng circumstances and visit the district office if he has any questions.

[4] The district office may instead forward the results directly to the Social Security Administration.

determination is pending for review before the Bureau of Disability Insurance if, for example, the beneficiary was currently being paid benefits although the State agency found that his disability ended more than two months earlier.

Actual benefit payments when terminated do not cease until two months after the month in which the disability is found to have ceased. 42 U.S.C. (Supp. V) 423(a)(1)(D). If benefits were previously suspended, the beneficiary is nevertheless entitled to payment for two months from the date of the cessation of his disability when termination is ordered. A beneficiary wishing to contest the decision to terminate his benefits is entitled to a *de novo* evidentiary hearing. 20 C.F.R. 404.917. If the initial agency action is reversed and reinstatement of disability benefits is ordered, corrective payments back to the date of suspension or initial termination are made.

The facts of this case are not in dispute. Radie Wright applied for and was awarded disability benefits in May 1966. In late 1968 he returned to work and continued working through December of 1969, earning a total of $4,441.81. He did not notify the Social Security Administration of his return to work.[4] In 1970 the Administration discovered that earnings had been posted to Wright's earnings record for the previous year. The Administration, through its Washington, D.C., district office, conducted an additional investigation, including a verification of the earnings and an

[4] In Item 21 of the application the claimant agreed to notify the Social Security Administration if he returned to work.

interview with Wright. The Social Security Administration's district office then forwarded this information to the Washington, D.C., Department of Vocational Rehabilitation, which determined that Wright's disability had ceased because he had demonstrated his ability to engage in substantial gainful employment.[6] The file was then forwarded to the Social Security Administration's Bureau of Disability Insurance. Acting pursuant to 42 U.S.C. 425, the Administration suspended his benefits on April 14, 1970, before making a final decision with respect to termination.[7] Wright then instituted this action, and on May 14, 1970, the district court entered a temporary restraining order requiring restoration of Wright's disability benefits.[7]

The three-judge district court held Section 225 of the Social Security Act unconstitutional because, under this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254, due process requires that a beneficiary have "an opportunity to participate in the determination proceedings prior to the suspension of benefits" (App. A 19). The court also ruled that, in the disability con-

[6] As of July 1969, Wright had exceeded the nine-month trial work period under Section 222(c), 42 U.S.C. 422(c). The Department considered August 1969 as the date Wright's disability ended.

[7] John D. Atkins, Jr., was an intervenor in the district court (App. A 16). Although his disability benefits were at one point terminated under Section 221 and then reinstated after reconsideration, his benefits were never suspended under Section 225, the section at issue in this case. He is therefore in a position no different from that of any other member of the class of persons receiving disability benefits and the particular facts relating to him are irrelevant to this case.

text, due process requires timely notice to a recipient together with an opportunity to examine documentary evidence against him and to present evidence in support of his claim. It stated that if the recipient's evidence conflicts with the evidence possessed by the Social Security Administration, this conflict should be resolved in a hearing before an impartial hearing examiner (App. A. 21). Judge Matthews, dissenting in part, stated that in addition to the procedural safeguards outlined by the majority, the beneficiary should be entitled to "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally [*Goldberg* v. *Kelly*, 397 U.S. 254, 268]" (App. A. 23).

The court's order provides for continued benefit payments to Wright and prohibits suspension of any social security disability benefits without affording the recipient adequate notice and opportunity to participate in the determination proceedings. The court subsequently stayed the part of its order that prohibited future suspension of social security disability benefits.

THE QUESTION IS SUBSTANTIAL

1. In this case the three-judge district court invalidated a significant provision of a major act of Congress. The need for this Court to determine the constitutionality of Section 225 is plain. The large number of decided and pending cases in which similar

constitutional challenges [8] have been made demonstrates the significance of the issue.[9]

2. The existing procedures under Section 225 for suspension of Social Security disability benefits payments satisfy the due process clause, since they adequately protect the recipients of those payments against arbitrary government action.

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[8] The constitutionality of Section 225 has been upheld in *Messer* v. *Finch*, 314 F. Supp. 511 (E.D. Ky.) (three-judge court), vacated and remanded for dismissal as moot, 400 U.S. 987. The right to a hearing prior to suspension or termination of disability benefits is pending in a number of other cases: *Doyle* v. *Richardson*, (C.A. 5, 31,104); *Moore* v. *Richardson*, (N.D. Calif., Civil No. C-70-2573); *Eldridge* v. *Richardson*, (W.D. Va., Civil No. 70-C-52-A); *Dye* v. *Richardson*, (W.D. Pa., Civil No. 70-1384) (dismissed March 8, 1971); *Harvey* v. *Richardson*, (W.D. Pa., Civil No. 70-1460); *Rodriquez* v. *Finch*, (D. Colo., Civil No. C-2294). The issue is also presented in several nondisability cases: *Anderson* v. *Finch*, (N.D. Ohio, Civil No. 70-425, decided January 15, 1971); *Garofalo* v. *Richardson*, (S.D. N.Y., Civil No. 70-5133); *Lindsay, et al* v. *Richardson*, (W.D. N.C., Civil No. 2794); *Van Guilder* v. *Richardson*, (D. Minn., Civil No. 4-70-386); *Hopkins* v. *Richardson*, (E.D. Pa., Civil No. 71-37); *Shisslak* v. *H.E.W.* (D. Ariz., Civil Action No. 71-35TUC); *Baker, et al* v. *Finch* (N.D. Ga., Civil No. 13786, decided December 21, 1970).

[9] The fiscal strain on the social security fund that would be imposed by the invalidation of Section 225 is significant. The Social Security Administration estimates that the cost per year of delaying all disability suspensions two months, which would be the minimum delay under the procedures imposed by the district court, would be $4,968,000. The cost of delaying all terminations of benefits pending application of the court's required procedures (a result which necessarily follows from the court's decision) would be approximately $18,212,688 per year.

Prior to the initial award of disability benefits, every claimant is advised that if his condition improves to the extent that he is no longer unable to engage in substantial gainful employment, his benefits will cease. The Secretary's decision to suspend benefits is based on objective evidence. Rumor, gossip or informers' "tips" are never the basis. Here the decision rested upon the appellee's actual earnings as reported by his employer to the Secretary. Moreover, benefits are never suspended because of earnings unless the beneficiary (or someone acting on his behalf) verifies that wages posted to his account in fact reflect his earnings.

In addition to the objective nature and high reliability of the evidence used to suspend benefits, the procedures followed afford further safeguards against an arbitrary determination.[10] The claimant is contacted regarding his continued disability. In this case, in addition, the information bearing on the question of continuing disability was assessed independently by qualified individuals at both the State agency and the Bureau of Disability Insurance. Benefits are suspended only when it appears necessary to prevent overpayment pending the final administrative determination on his continued eligibility.

3. The district court held, however, that these protections are not sufficient and that, prior to the suspension of benefits, the recipient must be afforded a hearing to resolve any conflicts in the evidence and

[10] Of 1,100 suspensions per month, only 9 percent are eventually reinstated.

must have "an opportunity to participate in the determination proceedings" (App. A 19). The latter requirement presumably relates to something other than the pre-suspension hearing.

The court's conclusion that the Due Process Clause requires such a hearing misapplies *Goldberg v. Kelly*, 397 U.S. 254. *Kelly* held that in view of the factors unique to the Aid to Families with Dependent Children ("AFDC") program, due process required the opportunity for a hearing before those benefits could be terminated. Nothing in *Kelly*, however, indicates that the same principle must be followed before Social Security disability benefits may be suspended because the recipient has had substantial earnings—and that is the only issue here involved. As appears below, there are significant reasons why the Secretary should not be required to follow the procedures prescribed in *Kelly* in dealing with the different situations here involved.

(a) The determination that the recipient has sufficient earnings to indicate that he no longer is disabled ordinarily rests upon objective evidence of the highest probative value—reports of such earnings made by the employer to the Secretary. Cf. *Richardson v. Perales*, No. 108, this Term, decided May 3, 1971, slip op. pp. 14–15. Moreover, the Secretary does not act until the nine-months' trial period of work has passed (see note 6, *supra*); the receipt of significant earnings for that time is compelling evidence that the person no longer is disabled. The decision to suspend because of substantial earnings thus turns

upon a significantly different kind of judgment than the decision to terminate welfare payments that was involved in *Kelly*.

The latter decision may result from personal and social situations brought to the attention of the authorities by tips, rumor or gossip. One of the recipients in *Kelly*, for example, had been cut off because of her alleged failure to cooperate with welfare authorities in suing her estranged husband; payments to another were terminated because of alleged drug addiction. 397 U.S. at 256, n. 2. Social security disability payments, however, are suspended only on the basis of an objective fact: that the previous disability has ceased. Where the cessation of disability is shown by the receipt of substantial earnings, the evidence is a regular report that the employer makes to the government for all his employees; its probative weight cannot be denied. Indeed, even where suspension occurs as a result of medical evidence that the disability has ceased, that determination, too, rests upon reports of medical examinations, which have long been recognized as highly reliable. *Perales, supra.*

Thus, the great risk of error and misjudgment that impelled this Court in *Kelly* to require pre-termination hearings is not present in suspensions of disability benefits based upon receipt of substantial earnings. The inherent trustworthiness of the evidence in this type of case insures fair determinations and adequately guards against the danger that any large number of eligible recipients will be improperly denied benefits until a hearing is held. Moreover, in such cases the

informal contact made with the recipient before suspension, at which he obviously has the chance to give his side of the case, provides him with adequate procedural protections.

(b) If the recipient must be permitted to participate in the determination proceedings, the adjudicative process presently followed will be considerably disrupted. Pursuant to Section 221 of the Act, 42 U.S.C. 421, as amended, 42 U.S.C. (Supp. V) 421, the Secretary has entered into agreements with each State under which a State agency, subject to review by the Secretary, makes the disability determinations in these cases. As the legislative history of the Social Security Amendments of 1954 indicates, State agencies were utilized because they had well-established relationships with the medical profession and would thereby remove the major case load from the Social Security Administration. By agreement, all State agencies apply the same standards in evaluating the severity of impairments, thereby insuring equal treatment of all disabled individuals. H. Rep. No. 1698, 83d Cong., 2d Sess., at 23–24 (1954). Under these agreements, the Secretary may reject a State agency's conclusion that disability has ceased and may require the agency to reconsider its finding in order to conform with these uniform standards.[11] Review of State agency determinations is performed by a trained Dis-

[11] The Secretary's authority to review determinations by State agencies in order to assure uniform administration was reiterated in subsequent legislative history. H. Rep. No. 2936, 84th Cong., 2d Sess., at 26 (1956).

ability Examiner at the Social Security Administration's Bureau of Disability Insurance.

Disability determinations are thus made in two steps: first by the State agency, and then by the Bureau of Disability Insurance of the Social Security Administration. Before these proceedings begin or during their course, when it appears necessary to prevent overpayment to a recipient who appears no longer disabled, the Secretary, acting through the Bureau of Disability Insurance or at the suggestion of the State agency, may suspend benefit payments under Section 225. The Social Security Administration requires a recipient, prior to suspension, to be notified in writing and asked to verify his earnings and explain the circumstances; if he has any questions, he is instructed to visit the district office.[12] A similar procedure was afforded to the plaintiff in the case.[13]

---

[12] The function of the local district office is limited to that of a fact-gathering and liaison nature. This results from centralizing initial determinations, first in the State agencies and then in the Bureau of Disability Insurance in Maryland. Such an arrangement not only makes possible the necessary concentration of personnel qualified to make the specialized medical and vocational evaluations required in disability cases, but also permits the Administration to staff its numerous district offices—which exceed 700 in number—with individuals who, although trained to obtain medical and other relevant data from claimants, do not have to be qualified to make medical judgments of the sort required in an adjudication of disability.

[13] The intervenor whose benefits were terminated under 42 U.S.C. 423, rather than suspended under 42 U.S.C. 425, al-

The district court's ruling that the claimant also is entitled to "an opportunity to participate in the determination proceedings prior to the suspension of benefits" (App. A 19) would require that the beneficiary be allowed to participate in either the State agency determination proceedings or the decision of the Bureau of Disability Insurance, which is located in Baltimore, Maryland. This procedure is impractical. It either would require the claimant to travel great distances or would necessitate that state and federal officials travel to the regional area where the claimant resides. The decision-making function could not be turned over to the social security district offices without vast disruption to the present system; although located conveniently to the claimants, these offices are not staffed with individuals qualified to make the medical and vocational judgments necessary for disability determinations. Moreover, the Act confers the power to make initial determinations only on State agencies. See 42 U.S.C. 421(a). The district court's decision, therefore, would require substantial changes in the present procedures, which are designed to effectuate the statutory allocation of functions prescribed by Congress.

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though not personally interviewed prior to the formal notice of termination, did have the advantage of the two month grace period provided in 42 U.S.C. 423(a)(1)(D). Such time afforded him the opportunity to submit evidence that nothwithstanding the initial determination of the Secretary he remained disabled, and thus made possible the correction of an erroneous termination without interrupting his benefit payments.

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CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted.

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MAY 1971.

APPENDIX A

United States District Court for the District of Columbia

(Civil Action No. 1457-70)

RADIE WRIGHT, ET AL., PLAINTIFFS

v.

ROBERT H. FINCH, DEFENDANT

Before ROBB, Circuit Judge, MATTHEWS, Senior District Judge, and GASCH, District Judge.

GASCH, District Judge: This class action [1] was initiated by plaintiff Radie Wright in behalf of all recipients of disability insurance benefits under Title II of the Social Security Act.[2] Radie Wright suffers from chronic gastritis, cirrhosis of the liver, hepatic decompensation arthritis and a heart condition. He was advised by his doctors that he could no longer work as a laborer because of his condition and his application for disability payments was approved by the Social Security Administration in May, 1968. Since that time he has drawn various amounts for his support and the support of his wife and two sons; his current payments are $126.70 per month for his own support plus smaller amounts for the support of his sons. In 1968, while still drawing benefit pay-

[1] The situation presented here meets the criterion of a class action maintainable under Rule 23(b)(2), Fed. R. Civ. P.

[2] 42 U.S.C. §§ 401 *et seq.* (1964).

ments, he returned to work and earned $343.32; he continued to work in 1969 and earned $4,098.49. He has not worked since December, 1969. The Administration checks earnings postings against the rolls of disability beneficiaries. This check revealed that Radie Wright had been employed. Following additional field investigation, including verification of the earnings with the employers and an interview with plaintiff, the Administration determined that because he had demonstrated ability to engage in substantial gainful activity that Radie Wright might no longer be eligible for disability payments. He was notified by letter on April 14, 1970, that his payments were being suspended as of that time pending further investigation of his eligibility.[3]

Intervenor-plaintiff, John D. Atkins, Jr., is currently a psychiatric patient of the Veterans Administration Hospital in Salem, Virginia. He has been under psychiatric care since December, 1966, and was found eligible for disability benefits by the Administration in July, 1967. He was informed by letter on February 3, 1970, that it had been determined that his disability had ceased as of January, 1970, apparently on the basis of an examination of the recipient and his medical records conducted by a doctor for the Social Security Administration in January, 1970. His benefits were to be terminated after the March, 1970, payment. This decision was subsequently reconsidered and Atkins was reinstated by the Administration. He is still subject to the suspension provisions of the Act.

Plaintiffs contend that section 225 of the Act[4] is unconstitutional in that it deprives them of property

[3] The notice given plaintiff was a form notice which explained that his benefit payments had been stopped because "your trial work period expired."

[4] *Id.*, § 425.

without due process of law.[6] That section of the Act provides:

> If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to [disability] benefits . . . may have ceased to be under a disability, the Secretary may suspend the payment of benefits . . . until it is determined . . . whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased.

In its recent decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the Supreme Court held that an evidentiary hearing was required prior to terminating welfare benefits under Title IV of the Act. The challenged section quoted above must similarly be held constitutionally deficient in that disability payments may be suspended without prior proceedings in which the recipient may participate.

I.

In *Goldberg* and the companion case of *Wheeler* v. *Montgomery*,[8] the Supreme Court has declared that benefits received under Title I (Old Age Assistance) and Title IV (Aid to Families with Dependent Children) of the Social Security Act are a matter of statutory entitlement for persons qualified to receive them.[7] Therefore, suspension or termination of these benefits are subject to the requirements of procedural

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[6] Since plaintiffs seek an injunction restraining the enforcement of an act of Congress due to an alleged constitutional defect, a three-judge court was convened pursuant to 28 U.S.C. §§ 2282, 2284 (1964).

[8] 397 U.S. 280 (1970).

[7] 397 U.S. 262.

due process. There is no significant difference between entitlement to those benefits and benefits under Title II (Old Age, Survivors and Disability Insurance Benefits).[8] It follows that disability beneficiaries must be accorded procedural due process in suspension and termination proceedings.[9]

II.

The exact procedures demanded by due process are determined by the circumstances of the particular situation. The determination of the appropriateness of the procedures requires balancing the governmental function involved against the private interest affected.[10] The Court stated the test in *Goldberg*: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[11] In *Goldberg*, the crucial factor was that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live

[8] Eligibility for Title I and Title IV benefits is based on the need of the recipient whereas Title II benefits are paid to individuals who are insured under the Act and meet the age or disability requirements. 42 U.S.C. §§ 402, 423 (1964). This distinction is not significant in determining the procedural rights of the recipient. *See* text accompanying note 12, *infra*.

[9] *See Flemming v. Nestor*, 363 U.S. 603 (1960). "The interest of a covered employee under the [Social Security Act] is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.*, at 611.

[10] *See, e.g., Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

[11] 397 U.S. 262–63 (citations omitted).

while he waits." This factor may not be as great in the case of a disability beneficiary as it is in the welfare recipient's situation. Disability beneficiaries are not, as are welfare recipients, dependent by definition on benefit payments for their livelihood. But a disability beneficiary is by definition unable to engage in substantial gainful activity and he would, therefore, be liable to sustain grievous loss while awaiting the resolution of his claim.

The countervailing governmental interests raised in support of the summary procedures are the protection of the Federal Disability Trust Fund from depletion due to payments to ineligible recipients pending determination of their status and the administrative expense involved in providing pre-termination review. These fiscal and administrative expenses to the government, whatever their magnitude, are insufficient justification considering the crippling blow that could be dealt to an individual in these circumstances. It is precisely this type of balance which led the *Goldberg* Court to require pre-termination review.

The ex-parte suspension power granted to the Secretary by section 225 is summary adjudication that is inconsistent with the requirements of due process. A disability beneficiary must be given adequate notice and an opportunity to participate in the determination proceedings prior to the suspension of benefits.

III.

The Supreme Court concluded that a "fair hearing" for welfare recipients must include timely and adequate notice, an opportunity for the recipient to present his case orally and the right to confront and cross-examine adverse witnesses. In determining the

[12] *Id.*, at 264.

type of hearing necessary, the Court relied on its previous holding in *Greene* v. *McElroy*.[13]

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, *it is even more important where evidence consists of the testimony of individuals whose memory might be faulty or who in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.* We have formalized these protections in the requirements of confrontation and cross-examination.[14]

The evidentiary basis for the determination of eligibility for welfare benefits which was considered by the Court in *Goldberg* in delineating the form of hearing required in that case differs from the situation presented here. The regulations[15] of the Social Security Administration provide that disability benefits can be terminated when medical or other evidence indicates that the impairment has ceased or when the individual has engaged in substantial gainful employment. The evidence to support these findings consists of medical reports and certification by employers

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[13] 360 U.S. 474 (1957).

[14] *Id.*, at 496 (emphasis added).

[15] 20 C.F.R. § 404.1539.

that the individual has been employed by them." If timely notice is given the recipient specifying the grounds for his proposed suspension and he is given reasonable opportunity to examine the documentary evidence supporting the action, there would be no necessity to hold a formal hearing where the medical personnel or the employers would have to be made available for cross-examination. The affected recipient should of course be given the opportunity to respond and submit evidence supporting his claim. The resolution of conflicting evidence at this point should be made by an impartial decision maker.[17] If the recipient has submitted some evidence that contradicts that possessed by the Administration, a hearing could be held to resolve those issues. The Social Security Administration should have an opportunity to develop presuspension proceedings[18] which afford

[16] The Bureau of Data Processing and Accounts of the Social Security Administration which maintains earnings records of all individuals covered under the Act, checks earnings posted against the rolls of disability beneficiaries. The Administration's Claims Manual instructs field personnel to contact employers for whom the disability beneficiary has worked while receiving benefits. Further, section 6708 of the Manual states that "benefits should not be suspended based solely on a report from an informant."

[17] The investigating officer who has compiled the record on which the decision is to be based should not make the final decision.

[18] The Secretary has formulated procedures for determining and reviewing rights with respect to the establishment and continuance of a period of disability. 20 C.F.R. Part 404, subpart J. These review procedures only become applicable after the administrative decision that the disability has ceased, 20 C.F.R. § 404.905(d), but could form a basis for the presus-

fundamental due process to the recipient before this Court rules on the adequacy of the details of that procedure."

I am authorized to state that Circuit Judge Robb concurs in this opinion.

OLIVER GASCH,
Judge.

JANUARY 6, 1971.

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pension proceedings which this decision requires. These regulations require that when an initial determination is made that the party to whom the determination applies be notified of the determination, of the basis of the determination, and informed of his right to request reconsideration. 20 C.F.R. § 404.907. The party may submit additional material for the purposes of the reconsideration. After initial determination and reconsideration, the individual has a right to a hearing before an impartial hearing examiner. 20 C.F.R. § 404.916. These regulations do not now apply to actions under 42 U.S.C. § 425, since suspension of benefits pending an investigation of continued eligibility is not an initial determination under the regulations. 20 C.F.R. § 404.906.

"The Supreme Court in *Goldberg* recognised "the importance of not imposing upon the . . . government . . . any procedural requirements beyond those demanded by rudimentary due process." 397 U.S. at 267. *See also* the dissenting opinion of Mr. Chief Justice Burger in *Wheeler* v. *Montgomery*, 397 U.S. 283 (1970).

MATTHEWS, Senior District Judge (concurring and dissenting in part): I concur in large part in the opinion, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970; *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970). In *Goldberg* the Supreme Court held that a welfare recipient, in addition to timely and adequate notice detailing the reasons for a proposed termination of benefits, must have "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Page 268. I respectfully dissent from so much of the opinion as seems to suggest that the procedural requirements of due process may be satisfied with something less than the "opportunity" specified in *Goldberg*.

BURNITA SHELTON MATTHEWS,
United States Senior District Judge.

APPENDIX B

United States District Court for the District of Columbia

(Civil Action No. 1457–70)

RADIE WRIGHT, ET AL., PLAINTIFFS

v.

ROBERT H. FINCH, DEFENDANT.

ORDER

Pursuant to the opinion filed in this case on January 6, 1971, which opinion is adopted as the Court's Findings of Fact and Conclusions of Law, it is by the Court this 12th day of February, 1971,

ORDERED that Section 225 of the Social Security Act be and it is hereby declared unconstitutional and void in that it denies recipients procedural due process in suspension proceedings, and it is further

ORDERED that plaintiff Radie Wright continue to receive Social Security Disability benefits until such time as his eligibility is suspended in accordance with the procedures outlined in the Opinion of January 6, 1971, and it is further

ORDERED that no Social Security Disability beneficiary be suspended without being afforded adequate notice and an opportunity to participate in the determination proceedings, and it is further

ORDERED that the Social Security Administration promulgate regulations governing the suspension of disability benefits to recipients which shall conform

to the requisites of procedural due process as outlined in the Opinion filed in this case, and it is further

ORDERED that plaintiffs' motion for summary judgment be and it is hereby granted to the extent reflected by the foregoing orders, and it is further

ORDERED that defendant's motion for summary judgment be and it is hereby denied.

OLIVER GASCH,
Judge.

APPENDIX C

United States District Court for the District of Columbia

(C.A. No. 1457-70)

RADIE WRIGHT, ET AL., PLAINTIFFS

v.

ROBERT H. FINCH, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the order of this Court entered February 12, 1971, in favor of the plaintiffs and against the defendant.

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing notice of appeal has been mailed to counsel for plaintiffs, E. Calvin Golumbic, Esquire, 36 N Street, S.E., Washington, D.C. 20003, this 12th day of March, 1971.

JOHN A. TERRY,
Assistant United States Attorney.

to the requisites of procedural due process as outlined in the Opinion filed in this case, and it is further

ORDERED that plaintiffs' motion for summary judgment be and it is hereby granted to the extent reflected by the foregoing orders, and it is further

ORDERED that defendant's motion for summary judgment be and it is hereby denied.

OLIVER GASCH
Judge.

APPENDIX D

STATUTES INVOLVED

42 U.S.C. (Supp. V) 425 provides in pertinent part:

> If the Secretary [of Health, Education and Welfare], on the basis of information obtained by or submitted to him, believes that an individual entitled to [disability insurance] benefits under section 423 of this title * * * may have ceased to be under a disability, the Secretary may suspend the payment of benefits under such section * * * 423 of this title until it is determined (as provided in section 421 of this title) whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased. * * *

20 C.F.R. 404.1521 provides:

> *Initial determinations as to entitlement or termination of entitlement.*—After any determination as to whether an individual * * * has ceased to be under a disability, the Administration will make an initial determination * * * with respect to entitlement * * * to disability insurance benefits * * *.

20 C.F.R. 404.905(d) provides:

> *Termination of monthly benefits or periods of disability.*—The Administration (or, in a disability claim, a State agency when required by a Federal-State agreement pursuant to section 221(b) of the Act) shall, with respect to a

party who has been determined to be entitled to monthly benefits or a period of disability, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether, under the applicable provisions of title II of the Act, such party's entitlement to monthly benefits, or a period of disability, has ended and, if so, the last month of such entitlement or * * * disability. Such findings of fact and determination shall be made whenever it appears to the Administration that such party's entitlement to monthly benefits, or a period of disability has ended. * * *

20 C.F.R. 404.906 provides in part:

Administrative actions which are not initial determinations.—(b) The suspension of benefits pursuant to section 225 of the Act pending investigation and determination as to the cessation of the disability * * * benefits under section 202(d) or 223 of the Act.

20 C.F.R. 404.908 provides:

Effect of Initial determination.—The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered * * * or it is revised * * *.

20 C.F.R. 404.917 provides in part:

Hearing; Right to hearing.—An individual has a right to a hearing about any matter designated in § 404.905 if: (a) An initial determination and a reconsideration of the initial determination have been made by the Administration * * *.

20 C.F.R. 404.1539 provides in part:

> *Cessation of disability.*—Where it has been determined that an individual is under a disability as defined in § 404.1501, the "disability" shall be found to have ceased:
>
> (a) In the case of an individual entitled to disability insurance benefits or child's insurance benefits based on disability, in the earlier of the following:
>
> (1) The month in which the impairment, as established by the medical or other evidence, is no longer of such severity as to prevent him from engaging in any substantial gainful activity * * * or
>
> (2) The month in which the individual has regained his ability to engage in substantial gainful activity * * * as demonstrated by work activity after * * * [a period of trial work] * * *.

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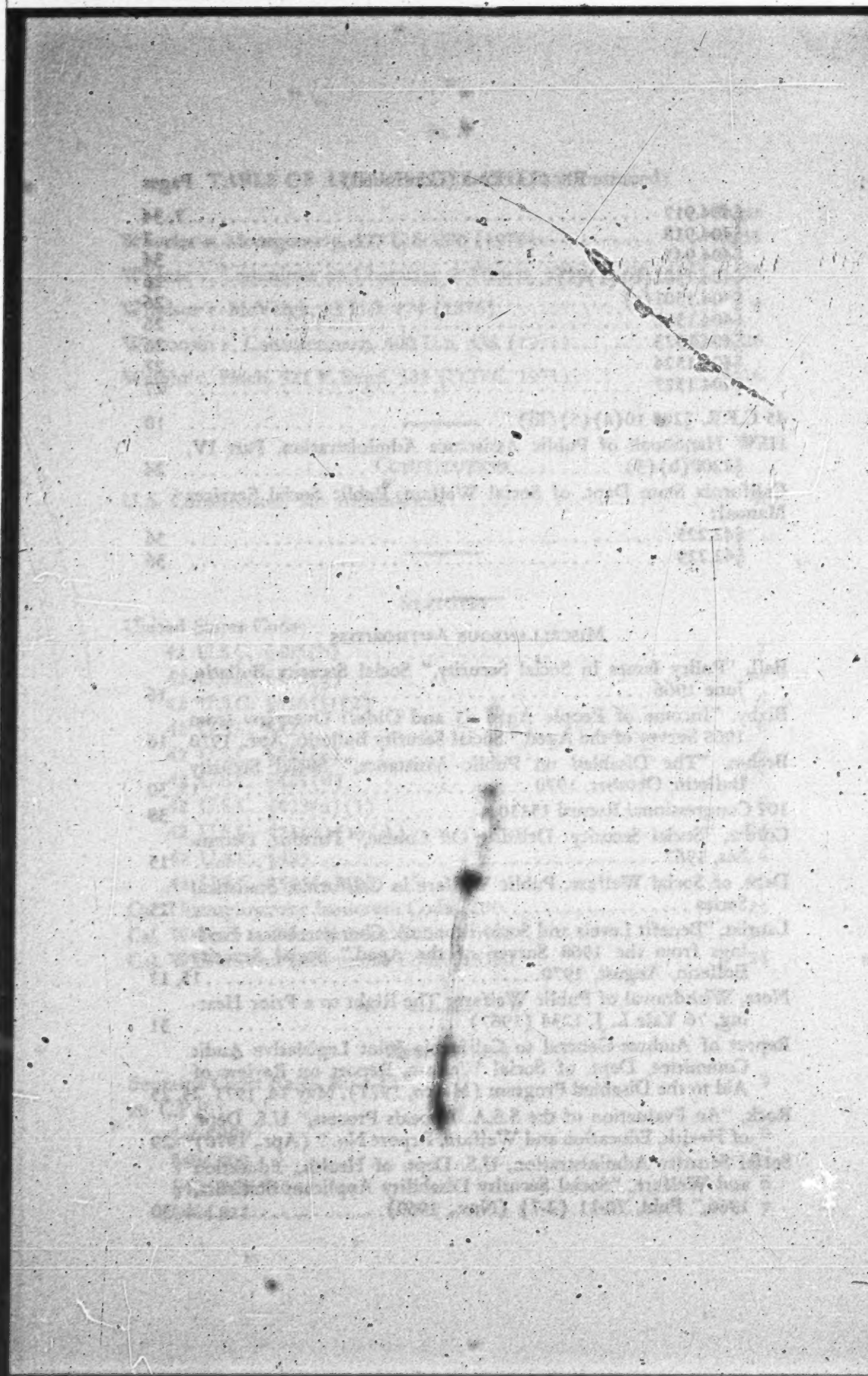

In the Supreme Court of the United States

October Term, 1971

No. 161

ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare,
Appellant,

vs.

RADIE WRIGHT, et al.,
Appellees.

No. 5211

RADIE P. WRIGHT, et al.,
Appellants,

vs.

ELLIOT L. RICHARDSON, Individually and in his Capacity as Secretary of Health, Education and Welfare,
Appellee.

On Appeal from the United States District Court for the District of Columbia

Brief for the Legal Aid Society of Alameda County as Amicus Curiae

INTEREST OF AMICUS CURIAE, LEGAL AID SOCIETY OF ALAMEDA COUNTY

The Legal Aid Society of Alameda County is a non-profit California corporation established in 1929 for the purpose of furnishing legal services to those

residents of Alameda County who are unable to afford the services of private attorneys. Staff attorneys of the Society have had extensive training and experience in Social Security law. They are currently representing plaintiffs in *Moore* v. *Richardson* (N.D. Cal. Civil No. C-70-2573, filed Dec. 1, 1970), a Social Security disability case awaiting oral argument before a three judge panel in the Northern District of California.

Moore v. *Richardson*, *supra*, is a class action in which plaintiff represents all Social Security disability insurance recipients residing within the geographical area encompassed by the United States District Court for the Northern District of California who have had or may have their benefits terminated without a prior hearing. The defendant is Elliot L. Richardson, Secretary of Health, Education and Welfare, appellant in No. 161 and appellee in No. 5211 herein [hereafter referred to as "the Secretary"]. The plaintiffs in *Moore* have a direct interest in the outcome of this litigation. As in the case *sub judice*, their claim is based on the contention that the statutes authorizing the suspension and termination of Social Security benefits without first affording a recipient a prior hearing are unconstitutional in that they deny the recipient due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

With the consent of both parties, pursuant to Rule 42 of the Supreme Court Rules, the Legal Aid Society of Alameda County respectfully submits its Amicus Curiae brief in support of Radie P. Wright, et al., appellants in No. 5211, and appellees in No. 161.

SUMMARY OF ARGUMENT

The court below found that the suspension section of the Social Security Act, 42 U.S.C. § 425 was unconstitutional in that it allowed for the suspension of benefits without prior proceedings in which the recipient may participate. But, as the opinion of Judge Mathews, concurring and dissenting in part, made clear, the majority did not extend to the recipient "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally," as this Court has required for welfare suspensions and terminations in *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970). *Wright* v. *Finch*, 321 F. Supp. 383, 388 (D.D.C., 1971). Amicus contends that procedural due process can only be satisfied by a prior hearing complying with the standards of *Goldberg*, *supra*.

In a series of recent cases involving procedural due process, this Court has continually stated that except in the most extraordinary situations, a meaningful opportunity to be heard must be provided *before* a person may be deprived of a significant prop-

erty interest. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Bell* v. *Burson*, 402 U.S. 535 (1971).

Social Security recipients are subjected to serious and often irreparable harm when their benefits are cut off. A large number of them stand in a similar economic position to the recipients of public assistance before the Court in *Goldberg*, *supra*, and the suspension or termination of their benefits often leaves them without any source of income whatsoever. An opportunity to be heard before their benefits are suspended is essential to protect them from arbitrary government action.

Moreover, the size of the reversal rate in Social Security disability cases—44.2%—a much greater figure than the rate of reversals found by the lower court[1] to be a "startling statistic" in *Goldberg*, bears striking witness to the great need of recipients for a prior hearing. The complex factual nature of Social Security determinations makes a prior hearing indispensable to the accurate resolution of disputed cases. Social Security disability cases present virtually the same issues as Welfare Aid for the Totally Disabled terminations for which prior hearings are currently being held as a result of the *Goldberg* ruling.

[1] See *Kelly* v. *Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968).

The Secretary's interest is fully consistent with the provision of a prior hearing. Social Security is an earned right, the deprivation of which without a prior hearing would tend to cause "the societal malaise . . . [and] widespread sense of unjustified frustration and insecurity," which the Court attempted to guard against in *Goldberg, supra*, 397 U.S. at 265. Moreover, since not all Social Security recipients are likely to be judgment proof and beyond the reach of the Secretary in the event of an overpayment, the administrative inconvenience and expense caused by Social Security prior hearings should be less burdensome than was the case with respect to welfare. Certainly, no "extraordinary situation"[3] justifying summary procedures is present in this case. Thus, on balance it is urged that a prior hearing is constitutionally mandated for Social Security recipients.

ARGUMENT

THE SECRETARY'S PROCEDURES IN SUSPENDING AND TERMINATING SOCIAL SECURITY BENEFITS WITHOUT A PRIOR HEARING DENIES SOCIAL SECURITY RECIPIENTS DUE PROCESS OF LAW.

I. The Secretary's Existing Procedure Does Not Afford the Recipient a Prior Hearing.

The statutory scheme pursuant to which social security disability benefits are generally suspended

[3] *Sniadach* v. *Family Finance Corp.*, supra. 395 U.S. at 339.

and terminated is as follows: 42 U.S.C. §416(i)(2) defines a "period of disability" and states that it shall end on "the second month following the month in which the disability ceases."[3] Determinations concerning disability are made by the Secretary in cooperation with the governments of each of the States and the District of Columbia, 42 U.S.C. §421. Under 42 U.S.C. §425 the Secretary is authorized to make *ex parte* decisions that a recipient's disability may have ceased and is further empowered to suspend his benefits. A decision to suspend is not considered an "initial determination", and this decision cannot be formally reconsidered or appealed. The Secretary then notifies the state agency charged with making disability determinations under 42 U.S.C. §421(a) which in turn determines whether the disability has ceased and if so, the date on which cessation occurred. This determination is regarded as the determination of the Secretary, and is an "initial determination" as defined in 20 CFR §404.905, and thus, may be formally reconsidered. Notice of the determination is mailed to the recipient who may request that it be reconsidered in accordance with 20 CFR §404.910-404.916. A reconsideration is an *ex parte* review by the state agency and the Social Security Administration in which the recipient may make only written submissions. The request for reconsideration must

[3] A period of disability also ends "on the month preceding the month in which the individual attains age 65." 42 U.S.C. § 416(i)(2). See also 42 U.S.C. § 423(a)(1) regarding entitlement to disability benefits.

ordinarily be made within six (6) months of the date of the mailing of the initial determination, 20 CFR §404.911; but, the Secretary has no time limit in reaching his decision. Notice of the reconsidered determination is subsequently mailed to the recipient.

Only after this process is completed may a recipient file a request for a hearing, 20 CFR §404.917. This request must be made within six (6) months of the notice of the reconsidered determination, 20 CFR §404.918; however, the Secretary's regulations do not require any time within which the hearing must be held or decided. The right to a hearing is provided for in 42 U.S.C. §421(d) and 42 U.S.C. §405(b). No right to a *prior* hearing is provided for by the statutes or regulations.

II. Only a Prior Hearing Satisfies the Requirements of Procedural Due Process.

It has long been recognized that the most basic and fundamental elements of due process in our law are notice of proceedings and an opportunity to be heard on the merits of a claim *before* one is subjected to official sanctions which effect a taking of property, liberty or life. *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1941); *Ohio Bell Telephone Company* v. *Public Utilities Commission*, 301 U.S. 292 (1937); *Southern Railway Co.* v. *Virginia*, 290 U.S. 190, 196 (1933); *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915); *Security Trust Company* v. *Lexington*,

208 U.S. 323 (1906); *Hovey* v. *Elliot*, 167 U.S. 409 (1897); *Windsor* v. *McVeigh*, 93 U.S. 274 (1876).

It is also beyond dispute that procedural due process is applicable to the Secretary's actions in suspending or terminating Social Security benefits. This Court has specifically held that the "interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Fleming* v. *Nestor*, 363 U.S. 603, 611 (1960). Social Security benefits just like welfare benefits are "a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights". *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970). Indeed the insurance benefits provided by Social Security are more of an "entitlement" than welfare benefits since these benefits are "earned" as the result of contributions made by the recipient out of his wages when he was fortunate enough to be able to work.

The Secretary does not contend that due process does not apply to the suspension or termination of Social Security benefits. But he does urge that due process is satisfied by an elaborate and time consuming procedure that provides the recipient with a meaningful opportunity to be heard only *months* after his benefits have been suspended or terminated pur-

suant to an "initial determination". Due process undeniably requires that an opportunity to be heard must be provided at a "meaningful time". *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). Thus, the major issue in this case is when notice and a hearing comporting with due process must be given.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) this Court held that the Wisconsin statutes permitting pre-judgment wage garnishments without notice and an opportunity to be heard on the merits violated procedural due process. The Court found that wages were "a specialized type of property" and that the pre-judgment garnishment of wages "may as a practical matter drive a wage-earning family to the wall". *Sniadach, supra*, at 340-342.

The situation of the Social Security recipient who has had his benefits suspended or terminated is even more compelling than that of the wage earner in *Sniadach*. In *Sniadach* the wage earner was only deprived of a portion of his wages; in no event could more than 50% of his earnings be garnished under Wisconsin law. *Sniadach, supra*, at 338 n.1. In comparison, the terminated Social Security recipient is deprived of his entire benefit check, which may well have been his sole source of income, and thus, is likely to be in even greater financial danger of being "driven . . . to the wall". *Sniadach, supra*, at 342.

Further, like the wages garnished in *Sniadach*, Social Security benefits also represent a "specialized type of property" since they are insurance benefits earned by a worker while employed and paid as a replacement for wages. Thus, as in the case of pre-judgment garnishees, Social Security recipients must also be afforded notice and a hearing before they may be deprived of their property.

Further light has been shed on the issue of when a hearing must be held by the recent decisions of this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and the companion case of *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970). The Court held in *Goldberg* and *Wheeler* that procedural due process requires an evidentiary hearing *before* welfare payments may be discontinued or suspended. The decisions therein have been made applicable to all categories of welfare recipients, including those receiving Aid to the Totally Disabled (ATD), and have been further extended to Medicaid recipients and to welfare benefit reductions by regulations promulgated by the litigant Secretary herein. 45 CFR §205.10(a)(5)(iii).

The factors and issues involved in determining whether a person is no longer totally disabled for purposes of ATD are almost precisely the same as those involved in determining that disability has ceased for purposes of Social Security disability benefits, and the recipient parties herein contend that

they are entitled to the same protections that their brethren receiving ATD are allowed. Is it not a strange irony that when a person receives both Aid to the Totally Disabled and Social Security disability benefits his ATD check is protected from summary *ex parte* termination but his earned Social Security benefits are not so protected?

In *Goldberg, supra*, the Court set forth the framework in which it would determine whether a prior hearing was required:

> The extent to which procedural due process must be afforded . . . depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. at 362-363.

It then found that:

> . . . the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. 397 U.S. at 266.

The Court concluded by holding that the "recipient [must] have timely and adequate notice detailing the reasons for a proposed termination and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own argu-

ments and evidence orally". *Goldberg, supra*, at 267-268. The right to retain an attorney and to be heard by an impartial decision-maker were also guaranteed. *Goldberg, supra*, at 270-271.

In holding that welfare benefits may not be suspended or terminated without a prior hearing, this Court made specific reference to *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), a case which indicates that the holding in *Goldberg* was not intended to be restricted solely to welfare recipients. The Court in *Goldberg* found that:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967). Thus, the crucial fact in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. 397 U.S. at 264.

Nash was concerned not with welfare, but with the plight of unemployment insurance recipients. Unemployment compensation is a program very similar in format, origin and purpose to Social Security disability. Indeed, all three social insurance programs

born in the Social Security Act — social security, welfare, and unemployment compensation — bear striking resemblance to each other. All were aimed at alleviating the plight of needy citizens. Together, they provide their recipients the funds necessary "to obtain essential food, clothing, housing and medical care". Cf. *Goldberg*, *supra*, at 264. Thus, the same procedural safeguards against arbitrary government action that are currently being enjoyed by welfare and unemployment compensation recipients, see *Crow* v. *California Dept. of Human Resources Development*, 325 F. Supp. 1314 (N.D. Cal. 1970), should also be extended to recipients of Social Security disability benefits.[4]

Two other recent cases decided just last term further suggest the right of Social Security recipients to prior hearings: In *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), this Court held that a State's failure to provide notice and an opportunity for a hearing to persons whose names were officially posted in liquor stores as "excessive drinkers" and then denied further sales or gifts of liquor, violated due process. Certainly the right to a prior hearing before the suspension or termination of earned Social Security benefits should be granted an equal footing with the rights protected in *Constantineau*.

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[4] Two Circuit Courts have held that the need of public housing tenants necessitates a prior due process hearing before they may be evicted. *Caulder* v. *Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); *Escalera* v. *New York City Housing Authority*, 425 F.2d 853 (2nd Cir.) *cert. denied*, 400 U.S. 853 (1970).

Then in *Bell* v. *Burson*, 402 U.S. 535, 542 (1971), the Court held that the suspension of a driver's license, which often is a prerequsite for a worker to obtain and hold employment, necessitates a prior hearing. The Court stated: "it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and an opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective". (Emphasis in original, footnote and citation omitted) The interests of the government in immediate social security terminations cannot be considered an "emergency", and, as in *Bell*, *supra*, such action must be preceded by a prior hearing.

III. The Social Security Recipient Is Caused Serious Harm When His Benefits Are Terminated Without a Prior Hearing.

A. Social Security disability benefits provide sustaining funds to injured workers.

The Secretary has urged that Social Security recipients should not be afforded the same due process protections that welfare recipients now receive because there is no means test for entitlement to Social Security benefits. Amicus admits that there is no means test for Social Security benefits, but respectfully submits that such a distinction is largely irrelevant: A substantial percentage of persons receiving Social Security benefits are *in fact* poor; moreover, the

due process right to a prior hearing is not reserved only for persons who are *per se* impoverished and destitute, but has regularly been accorded to classes of persons the preponderance of whom are vulnerable to severe economic loss. *Sniadach* v. *Family Finance Corp., supra.*

According to Robert M. Ball, Commissioner of the Social Security Administration: "One objective of the Social Security program has always been to contribute to the prevention of poverty. There is not the slightest question that the Social Security program has been the biggest anti-poverty program in this country." Cordtz, "Social Security: Drifting Off Course", *Fortune*, December, 1967, p. 207.

Information recently compiled by the Social Security Administration's Division of Disability Studies, Office of Research and Statistics, indicates that disability recipients are indeed poor. In 1966, of the 849,000 disability recipients, the median income was only *$2,836*. Brehm, "The Disabled on Public Assistance", Social Security Bulletin, October, 1970, p. 29. Further, "among [such] beneficiaries, 35 per cent were poor and 15 per cent near poor, on the basis of the Social Security Administration poverty and low-income index".[5] Brehm, *supra*, at 30. Moreover, in

[5] "In 1967, the pertinent poverty thresholds were:

	Poor	Near Poor
Married Couples	$2,020	$2,690
Non-married Couples	$1,600	$1,900

Lauriat, "Benefit Levels & Socio-Economic Characteristics: Findings from the 1968 Survey of the Aged", Social Security Bulletin, August, 1970, p. 9.

the Social Security disability insurance program, the beneficiary by definition is unable to work and thus, if terminated, cannot protect himself by working while the validity of his termination is being contested. As the three-judge court stated below, "a disability beneficiary is by definition unable to engage in substantial gainful activity and he would, therefore, be liable to sustain grievous loss while awaiting the resolution of his claim." *Wright* v. *Finch*, 321 F. Supp. 383, 386 (D.D.C. 1971).

The situation of the person receiving old-age benefits is even more acute than that of the disability recipient. According to Commissioner Ball, "About three-fourths of the aged who get Social Security benefits either are in the poverty group, strictly defined, or would be if it were not for Social Security", and regarding the other one-fourth, "most of [them] have low incomes even though above the poverty level". Ball, *Policy Issues in Social Security*, Social Security Bulletin, June, 1966, p. 5.

Of the aged beneficiaries of Old Age Social Security benefits, "forty-four per cent (44%) [are] classified as poor and eleven per cent (11%) as near poor, on the basis of income threshholds developed by the Social Security Administration."[8] Bixby, "Income of People Aged 65 and Older: Overview from 1968 Survey of the Aged", Social Security Bulletin, April,

[8] See n. 5, *supra*.

1970, p. 8. Statistics recently compiled by the Division of Retirement and Survivor Studies, Office of Research and Statistics indicate that ". . . sizeable proportions of all [aged] beneficiary units had little or no income in 1967 in addition to their [Social Security] benefits—that is, less than $150.00 per person." Lauriat, *supra*, at p. 10, n. 2.

Thus, it is beyond question that most beneficiaries of Social Security benefits have a substantial interest to protect. Just as in welfare, the loss of a monthly Social Security check "may deprive an *eligible* recipient of the very means by which to live while he waits." *Goldberg*, *supra*, at 264.

The Secretary's justification that he should be able to take summary, *ex parte* action because only a portion of the beneficiaries will suffer grievous loss is without merit. This argument wholly ignores *Sniadach* v. *Family Finance Corp.*, *supra*, wherein the Court extended prior hearing protections to wage earners despite the fact that they were not *per se* impoverished or destitute. *See p. 9 supra.*

The rationale of the *Sniadach* case has been applied to a number of other areas where the person being deprived of his property, or the use thereof, was not *per se* poor. This Court has required a hearing prior to the suspension of a driver's license and registration. *Bell* v. *Burson*, 402 U.S. 535 (1971).

The Wisconsin and California Supreme Courts have held that funds deposited in a bank may not be attached without a prior hearing. *Larson* v. *Fetherston*, 172 N.W. 2d. 20 (Wisc. Sup. Ct. 1969), *Randone* v. *Appellate Department*, 5 Cal. 3d 536, 96 Cal. Rptr. 709 (1971). Similarly, the Minnesota Supreme Court has held that the *Sniadach* rule applied to the pre-judgment garnishment of accounts receivable. *Jones Press* v. *Motor Travel Service, Inc.*, 176 N.W. 2d. 87 (Minn. Sup. Ct. 1970). Several federal district courts have recently held that innkeeper's lien laws were unconstitutional in their failure to provide for a hearing prior to the innkeeper's taking of a lodger's personal property for non-payment of rent. *Klim* v. *Jones*, 315 F. Supp. 109, (N.D. Calif. 1970), *Santiago* v. *McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970). Likewise, in *Blair* v. *Pitchess*, 5 Cal. 3d 258, 96 Cal. Rptr. 42 (1971), the California Supreme Court held that California's replevin law providing that personal property can be taken by a law enforcement officer pursuant to a creditor's instructions without notice or a prior hearing is unconstitutional citing *Goldberg* and *Sniadach*. The same result has also been reached by a three-judge district court in New York. *La Prease* v. *Raymoure Furniture Company*, 315 F. Supp. 716 (S.D. N.Y. 1970) Contra, *Fuentes* v. *Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970) *prob juris noted*, *Fuentes* v. *Shevin*, 401 U.S. 906 (1971); *Epps* v. *Cortese*, 326 F. Supp. 127 (E.D. Pa.) *prob. juris. noted*, 402 U.S. 994 (1971). Two three-judge courts

have held that a procedure which permits a debtor to sign an agreement containing a confession of judgment clause is unconstitutional absent his understanding and voluntary consent citing *Sniadach* and *Goldberg*. *Swarb* v. *Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970) *prob juris noted* 401 U.S. 991 (1971); *Osmond* v. *Spence*, 327 F. Supp. 1349, (D. Del. 1971). Two recent California cases dealing with landlord-tenant laws have further extended the *Sniadach* rationale. In *Mihans* v. *Municipal Court*, 7 Cal. App. 3d. 479, 87 Cal. Rptr. 17 (1970), the court held that a California procedure providing for a landlord's immediate possession of premises in cases of tenant insolvency or inability to respond in damages violated the due process prior hearing requirements of *Sniadach*. In *Gray* v. *Whitmore*, 14 Cal. App. 3d. 784, 92 Cal. Rptr. 505 (1971), the court held that the procedure whereby a landlord may execute on his tenant's personal property to satisfy his money judgment is unconstitutional insofar as it fails to afford the tenant-debtor a hearing on the question of whether the property is exempt from execution under California's exemption statutes.

Further undercutting the Secretary's position are two recent decisions concluding that due process of law requires a hearing to be held prior to the termination of unemployment compensation benefits. In *Java* v. *California Dept. of Human Resources Development*, 317 F. Supp. 875 (N.D. Cal. 1970) *aff'd*

on statutory grounds, 402 U.S. 121 (1971), a three-judge court held that *Goldberg* required a hearing prior to the suspension of unemployment insurance benefits as the result of an employer's appeal. Following *Java*, it was further held that a prior hearing was required in an instance where unemployment benefits were terminated because of a recipient's alleged refusal to accept suitable employment without good cause. *Crow* v. *California Dept. of Human Resources Development*, 325 F. Supp. 1314 (N.D. Cal., 1970). The *Java* case has recently been affirmed by this Court on statutory grounds, *Java* v. *California Dept. of Human Resources Development*, 402 U.S. 121 (1971). The unanimous Court recognized that unemployment benefits are a "contractual right not dependent on any means test", and held that 42 U.S.C. 503(a)(1), which provides that state unemployment compensation programs must be "reasonably calculated to insure full payment of unemployment compensation when due", meant that pre-termination hearings must be held before benefits may be suspended pending an employer's appeal. In reaching its decision, the Court reviewed the purposes of unemployment insurance and stated:

> Paying compensation to an unemployed worker promptly . . . accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. It seems clear therefore, that

> the California procedure, which suspends payments for a median period of seven to ten weeks pending appeal, after an initial determination of eligibility has been made, is not "reasonably calculated to insure full payment of unemployment compensation when due." 402 U.S. at 133.

The recipient of Social Security benefits is quite similar to the recipient of unemployment benefits in several respects. Neither is *per se* destitute, but in fact, the majority of the beneficiaries of both programs are poor or near poor. No means test is required for unemployment benefits; they are available to the occasional unemployed millionaire movie star as well as to a pauper. Like Social Security disability recipients, unemployment claimants find themselves unemployed "through no fault of their own", California Unemployment Insurance Code §100.

In *Goldberg, supra*, it may be recalled that the Court cited the case of *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), an unemployment insurance case, as an illustration of the type of interest that can only be adequately protected by a prior hearing. Thus, *Goldberg* indicates that this Court will not require complete destitution before affording recipients of social insurance programs a prior hearing.

In both *Java* and *Crow*, district courts carefully considered the fact that the need of the recipient of

unemployment insurance benefits was not *always* as great as that of welfare recipients and yet, both cases concluded that prior hearings are required on due process grounds. As the court stated in *Crow:*

> Reference is made to plaintiff Crow's financial situation, to the fact that she is married to an employed individual, and to the family's ownership of two (very used) automobiles. Defendants conclude with the argument that since Mrs. Crow does not lack "the very means to live" she is not entitled to the extraordinary remedy of a pre-termination hearing. . . .
>
> Defendants misread *Java*, *Goldberg*, relevant California statutes, and the recent history of American jurisprudence. The right to confront and cross-examine adverse witnesses, where an important decision hinges on a question of fact, is *not* an "extraordinary remedy". It has been found by the Supreme Court to be constitutionally mandated "in almost every setting". *Goldberg* v. *Kelly*, *cit. supra*, at 269. It is *welfare*, not unemployment compensation, or government employment, or garnishment proceedings which was for the longest time deemed outside the protection of the due process clause. The Court invoked the "brutal need" of the walfare client, not to give him special rights not enjoyed by others, but as part of the balancing process which has been employed in previous due process cases, e.g., *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 341-42 (1969), ("pre-judgment garnishment may . . .

> drive a wage-earning family to the wall"), and *Greene* v. *McElroy*, 360 U.S. 474, 508 (1959) ("petitioner's work opportunities have been severely limited. . . ."). It would be anamalous indeed if the Supreme Court's extension of procedural guarantees to welfare eligibility determinations was used to justify a restriction of similar rights previously recognized in other areas. 325 F. Supp., at 1317-1318.

The Social Security recipient represented by Amicus in *Moore* v. *Richardson*, *supra*, has neither an employed spouse to support her, nor a car, nor any savings or assets. Having had her earned, Social Security benefits terminated, she has been forced to rely on welfare Aid to the Totally Disabled for survival. As the three-judge district court stated in *Java:*

> Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster stricken that there is someone, somewhere, worse off that her, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in *Kelly* v. *Wyman*, 294 F. Supp. 893 (1968), and the garnishee in *Sniadach* v. *Family Finance Corp. of Bay View, et al*, 395 U.S. 337 (1969). . . . Defendants urge that

public assistance is available to plaintiffs, but Congress, in enacting the Social Security Act, has found that the dole is often inadequate and always humiliating. 317 F. Supp. at 878-879.

Moreover, welfare may not be available to the terminated Social Security recipient. In California, it is much more difficult to qualify for Aid to the Totally Disabled than for Social Security Disability benefits. For ATD, a claimant must have a disability which "appears reasonably certain to continue throughout the lifetime of the individual without substantial improvement." To qualify for Social Security, on the other hand, the disability need only "be expected to last for a continuous period of not less than 12 months." Compare Cal. Welfare & Institutions Code, §§ 13501, 13550 with 42 U.S.C. §423 (d)(1)(A). Even if ATD is available, months may pass before eligibility can be established. The State normally has 60 days to determine ATD eligibility. HEW Handbook of Public Assistance Administration, Part IV, §2200(b)(3). However, experience has indicated that at least the full 60 days are usually taken and that frequently a final decision is not reached for several weeks thereafter. As of March, 1971, 69.5% of all applications for ATD in California had been pending for more than 60 days; 22.5% were pending for more than 101 days. Report of Auditor-General to California Joint Legislative Audit Committee, Dept. of Social Welfare, Report on Review of

Aid to the Disabled Program (March, 1971), May 14, 1971, p. 11. In November, 1970, the number of ATD applications on file for more than 60 days totalled 19,890. Dept. of Social Welfare, Public Welfare in California, Statistical Series PA 3-123—PA 3-132.

Interests of far less immediate financial importance or need have traditionally been protected from summary action. For example, in such areas as license suspensions or terminations, due process requirements have regularly been imposed, *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964); *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963); *In re Carter*, 192 F. 2d 15 (D.C. Cir. 1951) *cert. denied*, 352 U.S. 862 (1951) and *Homer* v. *Richmond*, 292 F. 2d 719 (D.C. Cir. 1961). Moreover, due process requires a hearing before a student may be expelled from a tax-supported college. *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (5th Cir), *cert. denied* 368 U.S. 930 (1961).

Non-financial rights have also traditionally been protected by procedural due process, including parental rights in custody cases, *May* v. *Anderson*, 345 U.S. 528 (1952), the right not to be summarily deprived of telephone service upon the belief that the telephone is being used for unlawful purposes, *Sokol* v. *Public Utilities Commission*, 65 Cal. 2d 247, 53 Cal. Rptr. 673 (1966), and the right not to be "posted"

as an excessive drinker without a prior opportunity to be heard, *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971).

The Social Security disability recipients before this Court have all been found initially *eligible* for benefits only after a rigorous initial eligibility determination. Entitlement to disability depends upon an ". . . inability to engage in any substantial gainful activity because of any medically determinable . . . impairment . . ." 20 CFR. §404.1501(b)(1)(i). The impairment is one that must result from:

> anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and diagnostic techniques. Statements of the applicant, including his own description of his impairment (symptoms) are, alone, insufficient to establish the presence of a physical or mental impairment. 20 CFR §404.1501(c).

Other factors are also taken into consideration. The Social Security Administration looks at the individual's age, education and work experience. His ability to do other work is also a factor. 20 CFR §404.1502. An initial application for disability payments must submit detailed medical evidence, 20 CFR §404.1523, including a report of a licensed physician, a copy of hospital or other medical records, duly certified, and a description of the individual's capacity to perform significant functions, e.g., ability to walk, sit, and

handle objects. 20 C.F.R. §404.1524. These still may not suffice and the Administration may require any applicant to submit to a physical or mental examination. 20 C.F.R. §404.1527.

Thus, the initial eligibility determination is quite thorough, cf., *California Dept. of Human Resources Development* v. *Java*, 402 U.S. 121, 125-128 (1971), and well-designed to eliminate ineligible applicants. Common notions of fairness and due process would thus require that what is so rigorously won may not be lightly taken away. But that is precisely what occurs under the Secretary's present procedures.

B. The complex factual nature of Social Security Disability terminations makes a prior hearing indispensable to the accurate resolution of disputed cases.

The Secretary has argued in his Jurisdictional Statement that prior hearings are less necessary in Social Security disability termination cases than with welfare because the evidence upon which such actions are based is allegedly more objectively ascertainable than is the evidence in welfare cases. Amicus would again point out that recipients of welfare disability benefits (ATD) are presently being accorded prior hearings and that the issues involved in ATD cases are virtually identical to those raised in Social Security disability determinations.

Indeed, the issues involved in a disability termination are the very issues in which confrontation and

cross-examination are most needed. In his brief in *Moore* v. *Richardson*, *supra*, the Secretary admits that "disability determinations require complex judgments of medical and vocational factors by experts in those fields". If so, then shouldn't an opportunity to confront and cross-examine be provided for? If medical facts were indeed as "objectively ascertainable" and as "highly reliable" as the Secretary claims, then our courts and administrative tribunals could be emptied of the numerous attorneys and conflicting doctors who daily disagree about medical facts. Our law libraries could be emptied of texts regarding medical controversy and the cross-examination of doctors. Yet, defendant would decide these issues independently as a ministerial function. We submit that the only fair and accurate way to determine Social Security disability controveries is through an adversary hearing along the lines afforded welfare recipients in the *Goldberg* case.

The facts of the *Moore* case illustrate the need for an adversary hearing. Mrs. Moore's Social Security benefits were terminatd on the belief that her disability had ceased. Yet, one doctor stated that Mrs. Moore was "unable to work at this time". Another doctor disagreed, "I see no reason why this lady could not perform some gainful type of occupation and this would include the necessity to bend and stoop". A third doctor stated that she cannot do "appreciable

bending." Where is the truth? A due process hearing is the only reliable method for finding out.

The rate of reversals of *ex parte* Secretarial determinations starkly reveals the need of recipients for a prior hearing in Social Security disability cases. The reversal rate for all disability hearings for the period of July, 1965 to September, 1969 was *44.2 per cent.* Rock, *An Evaluation of the S.S.A. Appeals Process*, U.S. Dept. of Health, Education and Welfare, Report No. 7, at 4 (April, 1970). The figures for calendar year 1969 are illustrative. Of 9,185 requests for reconsideration of disability cessations, 2,904 were reversed upon reconsideration.[1] There were 1,895 hearings filed during fiscal year 1969 as a result of the Secretary's reconsidered determinations that disability had ceased, and 863 such determinations were reversed as a result of a hearing. Moreover, the Appeals Council reversed 16% of the disability cessation cases that it heard.

With a reversal rate of 44.2%, the interest of the recipient in a prior hearing becomes manifest. The reversal rate on appeal for the terminated welfare recipients in *Goldberg*, *supra*, was considerably lower, 36%. Yet, the lower court in *Goldberg* found this to be a "startling statistic". *Kelly* v. *Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968).

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[1] These figures were provided to Amicus in the Answers to Interrogatories in *Moore* v. *Richardson*, *supra*.

The Secretary's proven record of administrative error points out the glaring inadequacy of the opportunity currently provided the recipient to submit written evidence and present his arguments orally. Recipients are likely to be uneducated and elderly and thus, need the protection of a meaningful due process hearings before benefits are terminated. In 1966, "59% of the disabled-worker beneficiaries had no more than an eighth grade education, 3% had no formal education", *Brehm, supra*, at 29, and 72% of them were over the age of 50. Social Security Administration, U.S. Dept. of Health, Education and Welfare, *Social Security Disability Applicant Statistics, 1966*, Publ. 70-11 (2-7), Table 2, at 12 (Nov., 1969).

Finally, if prior hearings are mandated, the number of winning appeals filed by recipients would undoubtedly increase.

> [A recipient's] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the . . . bureaucracy. *Goldberg, supra*, at 264.

Without Social Security benefits, an *eligible*, suspended or terminated recipient may be seriously handicapped in presenting an appeal. Funds are necessary for contacting and preparing witnesses, and perhaps retaining counsel to represent him at the hearing. Faced with the need to provide the necessities of life for himself and his family, the terminated eligible recipient can scarcely devote the time and energy neces-

sary to prosecute his appeal. cf., Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L.J. 1234, 1244 (1967).

IV. The Secretary's Interest Is Fully Consonant With Providing a Hearing Prior to the Termination of Social Security Benefits.

Cases upholding summary procedures under the due process clause have been described as "emergency situations," *Bell* v. *Burson*, 402 U.S. 535, 542 (1971), or instances "where harm to the public is threatened." *R. A. Holman & Co.* v. *S.E.C.*, 299 F.2d 127, 131 (D.C. Cir.) *cert. denied* 370 U.S. 911 (1962). As the three-judge district court stated in *Goldberg*, *supra*, "Traditionally, such considerations have been urgent in nature and involve the health, safety, or well-being of many individuals". *Kelly* v. *Wyman*, 294 F. Supp. 893, 900 (S.D.N.Y. 1968).

Examples of situations that call for such summary proceedings include the seizure of allegedly contaminated food, *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908); the seizure of allegedly mislabeled food, *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); wartime price and rent regulations, *Bowles* v. *Willingham*, 321 U.S. 503 (1944); and the conservatorship of an insolvent savings and loan association, *Fahey* v. *Mallonee*, 332 U.S. 245 (1947). What these cases have in common is the distinct possibility of immediate and great harm to other citizens.

Obviously, the termination of a recipient's Social Security disability benefits presents no such threat to the health, safety or well-being of the nation. Rather, the only governmental interest urged herein by the Secretary is the same interest raised and rejected by this Court in *Goldberg*, *Java* and most recently *Bell*, namely, the conservation of fiscal and administrative resources.

The protection of the Social Security Trust Fund, which the recipient litigants have contributed to, is a legitimate governmental concern, but it in no way justifies the summary, *ex parte* termination of earned Social Security benefits. As the court stated in *Crow* v. *California Department of Human Resources Development*, *supra*:

> The public purse has been repeatedly invoked in cases prior to this one. This Court will only echo its predecessors: fiscal considerations are always relevant, but are seldom if ever decisive in cases of this sort. 325 F. Supp. at 1317.

The Secretary in his brief in *Moore* v. *Richardson*, *supra*, has assumed for purposes of a cost argument that every recipient whose disability has allegedly ceased, would pursue his right to a prior hearing. The argument has no basis in fact. Every Social Security recipient who finds himself terminated is no more likely to ask for a hearing than is every

welfare recipient whose benefits are terminated. The same argument was raised and rejected in *Goldberg* v. *Kelly, supra.*

Another confusing argument made by the Secretary in *Moore* v. *Richardson, supra,* is his statement that requiring a prior hearing would "create all but insuperable administrative difficulties in the handling of the approximately 950,000 disability determinations made each year." The argument is misleading since the requirement of a prior hearing affects only those recipients already determined *eligible* whose disability has now allegedly ceased and who are being terminated. No change at all will be required in procedures for determining initial eligibilty for benefits.

Identical cost arguments were advanced in the welfare prior hearing cases and rejected by this Court. In *Goldberg* the Court stated that:

> The requirement of a prior hearing, doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recovered since these recipients are likely to be judgment-proof. But, the state is not without weapons to minimize these increased costs. 397 U.S. at 266.

Procedures could be developed by the Secretary to eliminate many of the alleged administrative problems contemplated in his Jurisdictional Statement. The Social Security Act provides for an extensive system

of review of initial agency action including reconsideration by the Secretary (20 CFR §404.909), a fair hearing before a hearing examiner (20 CFR §404.917), review by the Appeals Council (20 CFR §404.945), and eventual review in federal district court (42 U.S.C. §405(g)). The fair hearing now provided, which is the crucial due process step, may be provided as easily prior to suspension of benefits as after. The doctors and other potential witnesses would be just as available for prior hearings as for hearings held months after a termination.

Requiring a hearing prior to the suspension of benefits would also increase the Secretary's efficiency by encouraging him to speed up his presently long and rather cumbersome appellate process. After an "initial determination" that disability has ceased, a recipient has six months to request a reconsideration, and following the reconsideration decision, he has another six months to request a hearing. There are no time limits for administrative decisions and actual practice indicates that the procedure is slow and ponderous. Answers to Interrogatories in *Moore* v. *Richardson*, *supra*, have shown that it takes an average of 99.8 days and a median period of 86 days from the time a request for a reconsideration is filed until a decision is reached thereon. The Secretary's Answers also reveal that the median length of time between the filing of a request for a hearing and the hearing decision is *114 days*.

By speeding up the time it takes to schedule and decide an appeal, any overpayments made pending the appeal will be sharply reduced. As the Court noted in *Goldberg* v. *Kelly*, 397 U.S. 254, 266 (1970):

> Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities.

Unlike welfare, where the Court noted that overpayments "probably cannot be recovered since [the] recipients are likely to be judgment proof", *Goldberg*, *supra*, 397 U.S. at 266, all Social Security recipients will not be judgment proof, and some overpayments will be recovered by the Secretary. Hence, the cost argument, rejected by the Court in *Goldberg* is even weaker in the context of Social Security benefits.

The Secretary in his brief in *Moore*, *supra*, further stated that "[the] requirement of *Goldberg* v. *Kelly* for a pre-termination hearing before the welfare official who determines continued eligibilty was premised upon the ready proximity of the official to the recipient." Amicus in reading the *Goldberg* opinion finds no such premise therein. Indeed, the experience under *Goldberg* and *Wheeler* v. *Montgomery*, *supra*, in California indicates that this is not the case. In California's Aid to the Totally Disabled program (ATD), for example, the State ATD team, composed

of a physician and a medical social worker, which makes re-determinations concerning disability, is situated in Sacramento, *California State Dept. of Social Welfare, Public Social Services Manual*, §42.229 (hereafter refered to as P.S.S. Manual).[4]

The government's interest in the conservation of monetary or administrative resources therefore does not outweigh the interests of recipients in a prior hearing. Rather, as the Court in *Goldberg*, recognized, the government's interest is not solely limited to the saving of resources, but "important government interests are promoted by affording recipients a pretermination evidentiary hearing:"

> From its founding, the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from

[4] A county medical consultant is charged with gathering and reviewing medical reports and other data before submission to the State Review team in Sacramento. P.S.S. Manual § 42.226.

> a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity". *The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.* 397 U.S. at 264-265. [Emphasis added].

These positive governmental interests are even stronger in the context of Social Security benefits. If public assistance is not "mere charity," Social Security benefits are not just "public assistance". See *Fleming* v. *Nestor*, *supra*. The government taxes workers so that they can live decently and "participate meaningfully in the life of the community" in the event of their disability. Social Security is an *earned* insurance benefit and it compensates the lost earning power of a bread winner who is now unable to work. A recent case, *Belcher* v. *Richardson*, 317 F. Supp. 1294 (S.D.W. Va. 1970), *prob. juris. noted* 401 U.S. 935 (1971) recognized this point in holding that the reduction of a recipient's Social Security disability benefits because he received a workman's compensation award for his disability was a violation of due process and equal protection. The court quoted the comments of Senator George, Chairman of the Senate Finance Committee, at the time of the passage of

the Social Security Act concerning its purpose and character:

> "It comports better than any substitute we have discovered with the American concept that free men want to *earn* their security and not ask for doles—that what is due as a matter of *earned right* is far better than a gratuity. . . . *Social Security is not a handout; it is not charity; it is not relief.* It is an *earned right* based upon the contributions and earnings of the individual. As an *earned right*, the individual is eligible to receive his benefit in dignity and self-respect." 102 Cong. Rec. 15110. (Emphasis added by Court) 317 F. Supp. at 1298.

Thus, the *ex parte* suspension by the Secretary is likely to be even more productive of "the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity," *Goldberg*, *supra*, at 297, than the suspension of welfare benefits, for during their working days recipients were continually aware, through deductions in their paychecks, that they were earning their Social Security benefits.

Finally, Amicus would point once again to the 44.2 per cent reversal rate for all disability hearings. Certainly it is in the interest of the Secretary to provide a pre-termination hearing to overcome the very high degree of error in his initial determinations, for no governmental objective is served by

allowing such erroneous determinations to stand so long before reversal at hearing. See pp. 29-31, *supra*.

Thus, upon balancing the interests, a prior hearing promotes both the recipient's and the government's interests with much less administrative and fiscal cost than was the case in *Goldberg*.

V. The Notice of Termination Provided by the Secretary is Constitutionally Inadequate.

In *Goldberg*, this Court required "that a recipient have timely and adequate notice detailing the reasons for a proposed termination . . ." *Goldberg*, *supra*, at 267-268. The notice provided by the Secretary does not meet this standard. The Secretary's form notice simply states that, "the medical evidence in your case shows that your condition has improved to the extent that you became eligible to do substantial gainful work in [month, year]." As discussed above, *supra*, at 27-31, disability determinations frequently involve complex factual determinations of medical and social data. Being informed that a decision was made on the basis of the "medical evidence in your case" only states what is obvious and informs the recipient of nothing. It is analogous with charging a man in a criminal case with "criminal activity."

A terminated recipient must be given notice specifying the medical evidence, the employment factors, and any other information relied upon by the Sec-

retary in making his determination. As the district court found in *Goldberg*, "the very summary form of notice of proposed termination makes an intelligent reply difficult." *Kelly* v. *Wyman*, *supra*, 294 F. Supp. at 904. Without adequate notice of the Secretary's claims, the right to a personal appearance is of limited utility.

CONCLUSION

In his concurring opinion in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), Mr. Justice Harlan pointed out that "notice and a prior hearing" are "the *usual* requisite of procedural due process." 395 U.S. at 342 (emphasis added). In *Goldberg*, *supra*, a prior due process hearing was recognized as essential to protect welfare recipients from the arbitrary termination of benefits. While the Social Security disability program and welfare bear striking resemblance to one another, Congress saw one basic distinction: Unlike welfare,[9] Social Security was considered a worker's *earned* "contractual right" to benefits which his labor and weekly payments helped to create. In providing sustaining funds, Social Security disability benefits serve the same purpose for the disabled worker as welfare serves for its beneficiaries.

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[9] Prior to *Goldberg*, welfare benefits were often considered to be a "gratuity." See *Goldberg* v. *Kelly*, 397 U.S. 254, 261 n.8 (1971); cf. *id.* at 271 (Black, J.) (dissenting opinion). Social Security, on the other hand, is considered an "earned right." See p.p. 37-38, *supra*.

Surely, due process provides injured workers with at least as much procedural protection as recipients of public assistance.

Dated: November 24, 1971.

Respectfully submitted,

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Nos. 70-161 and 70-5211

In the Supreme Court of the United States

OCTOBER TERM, 1971

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

RADIE WRIGHT, ET AL.

RADIE WRIGHT, ET AL., APPELLANTS

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION AND WELFARE

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-161

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION AND WELFARE

OPINION BELOW

The opinion of the district court (App. 95-103) is reported at 321 F. Supp. 383.

JURISDICTION

The order of the three-judge district court declaring 42 U.S.C. 425 unconstitutional was entered on Febru-

ary 12, 1971 (App. 104–105). Notices of appeal were filed on March 12, 1971 (App. 108–109), and the Court noted probable jurisdiction on October 12, 1971 (App. 111). The jurisdiction of this Court is conferred by 28 U.S.C. 1253.

QUESTION PRESENTED

Whether Section 225 of the Social Security Act, 42 U.S.C. 425, and the implementing procedures, under which disability benefit payments are suspended or terminated on the basis of wages reported by employers or written doctors' reports but without an oral hearing, are constitutional.

STATUTES AND REGULATIONS INVOLVED

Section 225 of the Social Security Act, 70 Stat. 817, as amended, 42 U.S.C. 425, and the relevant Department of Health, Education, and Welfare regulations are set forth in Appendix A to this brief, *infra*, pp. 35–56.

STATEMENT

Section 225 of the Social Security Act, 42 U.S.C. 425, provides that the Secretary may suspend social security disability benefit payments to an individual if he receives information leading him to believe that the individual is no longer disabled within the meaning of the Act.[1] The suspension remains in effect until

[1] Under Section 223(d)(1) of the Social Security Act, 42 U.S.C. 423(d)(1), disability is defined as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." The Act further provides that any person who is actually engaged in substantial gainful activity cannot qualify as disabled. 42 U.S.C. 423(d)(4). Substantial gainful activity is defined in 20 C.F.R. 404.1532(b).

the Secretary determines whether to terminate or reinstate benefit payments; such a determination is made after a more thorough investigation to verify the individual's disability status.

1. Appellee-cross-appellant Radie Wright, a resident of the District of Columbia, applied for and was awarded social security disability benefits beginning in May 1966 (App. 24, 37–38). In late 1968 Wright returned to work and continued working through December of 1969, earning at least $4,440.81 (App. 25–26, 38–40). He did not notify the Social Security Administration of his return to work, although required to do so (App. 38, 47).[2] In 1970 the Administration discovered that earnings had been posted to Wright's earnings record for the years 1968 and 1969 (App. 38).[3]

Acting through its Washington, D.C., district office, the Administration then conducted an additional investigation (App. 38–39). A claims representative interviewed Wright, advised him that his right to receive disability benefits was being investigated and, upon his confirmation that he had worked during 1968 and 1969, further advised him that his benefits

[2] In item 21 of his application for benefits, Wright agreed to notify the Social Security Administration if he returned to work (App. 37). See 20 C.F.R. 404.1531.

[3] Employers are required by the Internal Revenue Code (Subtitle C, 26 U.S.C. 3101 *et seq.*) and regulations (Treas. Reg. 601.401 (1971)) to report quarterly to the Internal Revenue Service wages paid to all employees. These wage reportings are forwarded by I.R.S. to the Social Security Administration, whose Bureau of Data Processing and Accounts post each wage earner's quarterly earnings to his social security account.

would likely be stopped (App. 26, 38–39, 47). In addition, the district office verified most of Wright's employment through his former employers (App. 38–39). The Social Security Administration's district office then forwarded this information to the District of Columbia Department of Vocational Rehabilitation, which determined that Wright's disability had ceased because he had demonstrated his ability to engage in substantial gainful activity (App. 39).[4]

Upon a review of the D.C. Department's determination, the Social Security Administration's Bureau of Disability Insurance suspended Wright's benefits pursuant to 42 U.S.C. 425 pending verification of the remainder of his earnings record for purposes of a final decision on the termination of those benefits (App. 39–40). By letter of April 14, 1970, the Administration advised Wright of this action (App. 13).[5]

On May 13, 1970, Wright instituted the present class action for review of the administrative decision. He sought a declaration that Section 225 is unconstitutional and injunctive relief requiring the Secre-

[4] As of July 1969, Wright had exceeded the nine-month trial work period during which, under 42 U.S.C. 422(c) and 20 C.F.R. 404.1536, the disability of an individual entitled to disability benefits shall not be found to have ceased. The D.C. Department of Vocational Rehabilitation therefore concluded that Wright's disability had ceased in August 1969 (App. 39).

[5] By letter of April 10, 1970, to the Director of the Bureau of Disability Insurance, Wright's attorney stated that Wright was then unemployed and therefore relying on his benefits for support and urged that he be given a hearing prior to any suspension or termination of those benefits (App. 14–15).

tary to restore his benefits until he is afforded notice and opportunity for a fair hearing (App. 5–12). The district court subsequently entered a temporary restraining order requiring restoration of Wright's disability benefits (App. 32–33) and authorized Wright to maintain the suit as a class action (App. 86).

2. Appellee-cross-appellant John Atkins, Jr., a resident of Virginia, applied for and was awarded social security disability benefits beginning in July 1967 (App. 78, 89). He had entered the Perry Point, Maryland Veterans Administration Hospital in December 1966 for psychiatric treatment (App. 78–79, 89–90). In late 1969, the Social Security Administration discovered in an investigation[*] that Atkins had been discharged from the Perry Point Hospital, had briefly entered Western State Hospital at Staunton, Virginia, and was currently residing as a psychiatric patient in a lodge maintained in Roanoke, Virginia, by the Salem, Virginia, VA Hospital (App. 78–80, 89–90).

The Administration forwarded Atkins' file to the Virginia State Agency, which determined, on the basis of medical evidence obtained from the Western State and Salem Hospitals and an examination of Atkins by a consultant psychiatrist, that Atkins' disability had ceased as of January 1970 (App. 79–80, 90–91). Upon review, the Administration's Bureau of Disability In-

[*] At the time he applied for disability benefits, Atkins was advised that his discharge from the hospital might cause the Administration to reevaluate his entitlement to such benefits (App. 89–90). The Administration began its investigation when the Perry Point Hospital returned Atkins' August benefit check as undeliverable (App. 90).

surance approved the state agency's determination (App. 92), and by letter of February 3, 1970, advised Atkins of this determination and of the fact that his benefits would be terminated as of the end of March 1970 (App. 67). The letter further advised him of his right to reconsideration of the determination if he requested this within six months and his right to submit additional medical information (App. 67–68).

On February 4, 1970, Atkins wrote to the Social Security Administration, requesting reconsideration and stating that he was still a patient at the Salem VA Hospital (App. 69–70). Upon reconsideration, the Virginia State Agency determined, on the basis of statements submitted by Atkins and his clinical psychologist together with a re-evaluation of its consultant psychiatrist's report, that Atkins continued to be disabled (App. 93). The Administration's Bureau of Disability Insurance subsequently approved this determination and notified Atkins on April 29, 1970, that his benefits would continue (App. 73, 81, 93–94).[7] The Administration also advised Atkins that, because the medical evidence indicated his condition might improve, his disability status would be reviewed about September 1971 (App. 73).[8]

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[7] There was no break in the continuity of monthly disability benefits received by Atkins (see App. 93–94).

[8] On June 9, 1971, Atkins wrote the following letter to the Administration's district office in Roanoke (App. C, *infra* p. 59):

> On this date I accepted a Civil Service Job which pays $8500 per annum. My Social Security number is 246-12-5511.
>
> In view of the fact that this is my first employment since I was discharged from the V.A. Hospital, Salem, Va., I

On July 17, 1970, Atkins moved to intervene in the present case as a party plaintiff, claiming to be a member of the class in whose behalf the case was brought and alleging that in September 1971 he would again be subject to having his benefits terminated without a hearing (App. 52–63). The district court granted Atkins' motion (App. 86).

3. The three-judge district court held Section 225 of the Social Security Act unconstitutional because, under this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254, due process requires that a beneficiary have "an opportunity to participate in the determination proceedings prior to the suspension of benefits" (App. 99). The court dealt only with the procedures for suspension and did not rule on the adequacy of procedures for termination, which might take place without a prior suspension (see pp. 18–19 *infra*).

Although recognizing that, with respect to welfare determinations, *Kelly* held that a fair hearing "must include [1] timely and adequate notice, [2] an opportunity for the recipient to present his case orally and [3] the right to confront and cross-examine adverse witnesses" (App. 99), the district court concluded that the third requirement would be necessary for disability cases only when the "recipient has submitted some evidence that contradicts that possessed by the Administration" (App. 101). For other cases, the court held that an "impartial decision maker," who cannot be the investigating officer who compiled the record, could render a decision after hearing the recipient's re-

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request that I be allowed to enter into a trial work period for the next nine months.

sponse and considering the evidence presented by him (App. 101 & note 17). The court made this distinction regarding the form of the hearing on the basis that disability determinations rest on evidence different from that relied upon for welfare determinations. Judge Matthews, dissenting in part, quoted this Court's statement in *Goldberg* v. *Kelly*, 397 U.S. 254, 268, that the recipient should be entitled to "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally" and expressed disagreement with "so much of the [district court's] opinion as seems to suggest that the procedural requirements of due process may be satisfied with something less than the 'opportunity' specified in *Goldberg*." (App. 103.)

The court's order provides for continued benefit payments to Wright and prohibits suspension of any social security disability benefits without affording the recipient adequate notice and opportunity to participate in the determination proceedings (App. 104–105). The court subsequently stayed the part of its order that prohibited future suspension of social security disability benefits (App. 110).[9]

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[9] The constitutionality of Section 225 has been upheld in *Messer* v. *Finch*, 314 F. Supp. 511 (E.D. Ky.) (three-judge court), vacated and remanded for dismissal as moot, 400 U.S. 987. The issue regarding a right to a hearing prior to suspension or termination of disability benefits is presented in a number of other cases: *Doyle* v. *Richardson* (C.A. 5, No. 31,104); *Moore* v. *Richardson* (N.D. Calif., Civ. No. C-70-2573); *Eldridge* v. *Richardson* (W.D. Va., Civ. No. 70-C-52-A) (dismissed May 6, 1971); *Dye* v. *Richardson* (W.D. Pa., Civ. No. 70-1384) (dismissed March 8, 1971); *Harvey* v. *Richardson*

ARGUMENT

INTRODUCTION AND SUMMARY

The "vast workings of the social security administrative system," *Richardson* v. *Perales*, 402 U.S. 389, 403, require millions of determinations each year that persons are no longer eligible for benefit payments, see note 29, *supra*. Thousands of these determinations involve persons receiving disability benefits. The Social Security Administration is deeply concerned with administering the disability program fairly for everyone. But it is also concerned with the practical needs of administration and the necessity of having the program function efficiently and effectively for those entitled to benefits. These goals must be reconciled.

The decision to suspend or terminate disability benefits is made on the basis of highly reliable information—wages reported by the beneficiary's em-

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(W.D. Pa., Civ. No. 70-1460); *Rodriquez* v. *Finch* (D. Colo., Civ. No. C-2294) (dismissed July 1, 1971); *Olivas* v. *Secretary of HEW* (D. Colo., Civ. No. C-3262). The issue is also presented in several nondisability cases: *Anderson* v. *Finch* (N.D. Ohio, Civ. No. 70-425, decided January 15, 1971, and pending before C.A. 6, No. 71-1317); *Garofalo* v. *Richardson* (S.D.N.Y., Civ. No. 70-5133) (remanded July 16, 1971); *Lindsay* v. *Richardson* (W.D. N.C., Civ. No. 2794); *Van Guilder* v. *Richardson* (D. Minn., Civ. No. 4-70-386); *Hopkins* v. *Richardson* (E.D. Pa., Civ. No. 71-37); *Shisslak* v. *H.E.W.* (D. Ariz., Civ. No. 71-35 TUC, decided April 9, 1971 and pending before C.A. 9, No. 71-2060); *Baker* v. *Finch* (N.D. Ga., Civ. No. 13786, decided September 13, 1971); *Corona* v. *Richardson* (N.D. Calif., Civ. No. 70-2662); *Recide* v. *Richardson* (D. Hawaii, Civ. No. 70-3426); *Mills* v. *Richardson* (N.D. N.Y., Civ. No. 71-CV-208, decided October 15, 1971).

ployer or written medical reports. Cf. *Perales*, *supra*. The requirements of due process in suspension or termination proceedings are satisfied if the beneficiary has a fair opportunity to contradict or contest anything prejudicial to his position before a decision is reached. In our view, beneficiaries have such an opportunity if they are given timely notice of the evidence against them and the chance to respond in writing by presenting their own evidence and arguments before any adverse action is taken. Such a "hearing on paper" satisfies due process in the context of suspensions or terminations for disability benefits since the evidence upon which these actions are taken—wage postings or medical reports—is highly reliable and not of a type that draws into issue veracity or credibility.

A requirement that evidentiary hearings should be held before any suspensions or terminations occur would necessitate massive restructuring of the entire disability program, would bring about duplication in staffing between State and federal agencies of the highly trained personnel needed to make these decisions and would result in losses to the Social Security Trust Fund of nearly $16 million per year for disability cases and still greater sums when all Title II programs are considered. This kind of voluminous and drastic revamping of a functioning program serving 100 million people each year is not required by the Constitution. Written submissions not only ensure that beneficiaries have their entitlement to disability benefits determined fairly and accurately, but also allow reconciliation of

the need for fairness with the needs of practical administration. In these circumstances, due process requires no more.

I. THE PROCEDURES PRESENTLY FOLLOWED IN SUSPENDING AND TERMINATING DISABILITY BENEFITS UNDER SECTION 225

Pursuant to Section 221 of the Act, 42 U.S.C. 421, as amended, the Secretary has entered into agreements with each State (including the District of Columbia) under which a State agency, subject to review by the Secretary, makes the initial determination whether a claimant is under a disability, when it began, and whether a beneficiary's disability has ceased and when (20 C.F.R. 404.905 (c) and (d), 404.1520). These State agencies are generally centralized in one office in each State.[10] As the legislative history of the Social Security Amendments of 1954 indicates, State agencies were utilized because they had well-established relationships with the medical profession and would thereby remove the major case load from the Social Security Administration. H.R. Rep. No. 1698, 83d Cong., 2d Sess., at 23–24 (1954).

By agreement, all State agencies apply the same standards in evaluating the severity of impairments, thereby insuring equal treatment of all disabled individuals. Under these agreements, the Secretary upon review of a State agency's conclusion that disability

[10] The Missouri and Florida agencies have 5 offices each; Louisiana has 3; and California has 2. All of the agencies in the other States have only one office. Disability Insurance State Manual, Appendix D.

has ceased may require the agency to reconsider its finding in order to conform with these uniform standards.[11] Review of State agency determinations is performed by a trained Disability Examiner at the Social Security Administration's Bureau of Disability Insurance, which is located in Baltimore, Maryland.

Disability determinations are thus made in two steps: first by the centralized State agency, and then by the Bureau of Disability Insurance of the Social Security Administration in Baltimore.

Implicit in the disability insurance scheme established by Title II of the Social Security Act is the obligation of the Secretary to terminate an individual's disability benefits when he no longer is under a disability as defined in the Act.[12] This administrative obligation has given rise to the Social Security Administration's "continuing disability investigation" procedures, by which the Bureau of Disability Insurance periodically re-evaluates beneficiaries to determine whether their disabilities continue.[13] Under those procedures, a continuing disability investigation of a particular beneficiary is initiated upon the receipt of information indicating that he no longer is disabled. Such an investigation is always initiated (a) when the

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[11] The Secretary's authority to review determinations by State agencies in order to assure uniform administration was reiterated in subsequent legislative history. H.R. Rept. No. 2936, 84th Cong., 2d Sess., at 26 (1956).

[12] See, *e.g.*, 42 U.S.C. 416(i)(2), 422(c) and 423(a)(1).

[13] See, *e.g.*, 20 C.F.R. 404.1528. The continuing disability investigation procedures are set forth in detail in the Administration's Claims Manual, §§ 6700 *et seq.*, a copy of which has been filed with this Court.

beneficiary reports that his condition has improved, that he has returned to work, or that he has been released from a hospital;[14] (b) when notice is received that the beneficiary's address has changed from a hospital to a private residence; (c) when an employer reports wages that have been earned by the beneficiary (see note 3, *supra*); or (d) when a scheduled medical examination of the beneficiary shows that he is no longer disabled.[15]

Upon receiving such information, the Social Security Administration's Bureau of Disability Insurance will instruct the Administration's local district office to conduct an investigation. In the past, as part of the investigation, the district office attempted to interview the beneficiary personally. However, for situations involving wage postings and medical re-examinations, the Bureau or the State agency will get in touch with the beneficiary by mail pursuant to a recent experimental procedure designed to relieve the overburdened district offices (Claims Manual, §§ 6710, 6730).[16]

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[14] The regulations require a disability beneficiary to notify the Administration promptly if his condition improves, if he engages in any work activity or his earnings from work increase, or if he is discharged from a hospital or similar institution (20 C.F.R. 404.1531).

[15] See § 6705 of the Claims Manual. As noted in § 6705(f), medical re-examinations are scheduled in the future in those cases in which current medical evidence shows that the beneficiary's disability may eventually cease.

[16] Prior to July 1969, with regard to beneficiaries for whom medical re-examinations were scheduled, and prior to August 1970, with regard to beneficiaries for whom the Bureau received wage postings, personal interviews were always conducted. After those respective dates, however, because of over-

As a result of its investigation, the district office may request the Bureau to suspend an individual's benefits in any of the following situations: (1) the beneficiary possibly has recovered, considers himself no longer disabled, and has been employed full-time with his doctor's permission at his former occupation for at least two consecutive calendar months; (2) the beneficiary possibly has recovered, is working at an occupation other than his former work and states that he has been working full-time for at least two consec-

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burdened district offices, the Administration instituted experimental procedures. Under those procedures, in place of the district office interview, each beneficiary to be medically reexamined is contacted by the State agency by mail and each beneficiary for whom wage postings have been received is contacted by the Bureau of Disability Insurance by mail and is asked to furnish in writing certain information, including: (1) whether he has seen a doctor or has been hospitalized within the past six months and, if so, the name, address and phone number of his doctor or the hospital; (2) whether he is receiving vocational rehabilitation services and, if so, the name and address of his rehabilitation office and counselor; (3) whether he has worked in the past year and, if so, the name, address and phone number of his employer, the kind of work he has done and when he began, his average hours worked and average gross earnings; (4) whether he is still working and, if not, the date he stopped; and (5) whether his doctor agreed that he should work. Each beneficiary is also advised to call or visit the nearest district office if he has any questions. If any such beneficiary fails to respond to the written inquiries of the State agency or the Bureau, the local Social Security Administration district office will be instructed to get in touch with him (Claims Manual, §§ T6705, T6706, T6709; SSA Disability Insurance Letter Nos. III–9, with attached form SSA–9577, and III–10, all of which have been filed with this Court).

utive calendar months; (3) the beneficiary's nine-month trial work period has ended (see note 4 *supra*, and Claims Manual, § 6703) and he has been engaged in substantial gainful activity or earning more than $140 a month in eleven or more months; (4) a beneficiary who is not entitled to a trial work period (see Claims Manual, § 6703.2) states that he is working full-time and has been engaged in substantial gainful activity or earning more than $140 a month in at least two consecutive calendar months; or (5) the beneficiary refuses to cooperate with the Administration (Claims Manual, §§ 6732, 6734, 6742). In those cases in which the beneficiary has returned to work, the district office will attempt to develop the details of his work activity (Claims Manual § 6712). If the district office decides to request suspension, it must "inform the beneficiary so he can prepare himself for the check stoppage" (Claims Manual, § 6708).[17]

After completing its investigation, the district office will forward all the information it has compiled together with the beneficiary's claims file to the appropriate State agency for a determination whether his disability has ceased and, if so, the month in which it ceased (Claims Manual, §§ 6701, 6732, 6734, 6740,

[17] If the Bureau possesses the required verified information, such as when it has contacted the beneficiary by direct mail (see note 16, *supra*), the Bureau may suspend benefits before sending the case to the local district office for any further factual development (Claims Manual, § 6708). The Bureau will not suspend or terminate benefits on the basis of work or wage information without first going through the district office unless such information is supplied by the beneficiary.

6742). Before making this determination, the State agency will obtain all the necessary medical evidence of the beneficiary's current condition (Claims Manual, § 6701(b); 20 C.F.R. 404.1527, 404.1528). A beneficiary's disability will be found to have ceased: (1) as of the first month, after expiration of his nine-month trial work period, in which the evidence establishes that he has returned to or is able to engage in substantial gainful activity; (2) if he is not entitled to a trial work period, as of the first month in which he engages in substantial gainful activity; or (3) as of the month in which the evidence establishes that medical recovery has occurred (Claims Manual, § 6706; 20 C.F.R. 404.1539).[18] A State agency's determination that the beneficiary is no longer disabled must be supported by specific findings and conclusions (20 C.F.R. 404.905(d)). If a finding is made that a beneficiary's disability has ceased, the State agency may request the Bureau to suspend his benefits in order to prevent overpayments pending a decision on termination.

The State agency will then forward its determination of disability continuance or cessation to the Administration's Bureau of Disability Insurance for review (42 U.S.C. 421(c); Claims Manual, § 6701(b) and (c)). If not already ordered, the Bureau if war-

[18] Additionally, a beneficiary's disability will be found to have ceased: (4) as of the month in which it is determined that, despite reasonable effort, the beneficiary cannot be located and that there is a reasonable possibility that his disability has ceased; or (5) as of the month it is determined that a beneficiary will not cooperate (after a personal interview) and there is a question of continuing disability (Claims Manual, § 6706).

ranted may suspend a beneficiary's benefits while the State agency determination is pending for review before it, such as when the State agency has determined that his disability had ceased more than two months earlier (42 U.S.C. 423(a)(1)(D)). Whether upon the request of the district office or the State agency or upon the initiative of the Bureau, benefits are suspended only when it appears necessary to prevent overpayment pending final administrative determination of the beneficiary's disability (Claims Manual, § 6708). The Bureau may approve the initial State agency determination, determine that the beneficiary's disability ceased on a date earlier than that found by the State agency, or determine that the case requires further factual development (42 U.S.C. 421(c); 20 C.F.R. 404.1520; Claims Manual, § 6701(c)). The beneficiary will be notified by the Bureau of its final determination (Claims Manual, § 6701(c)).

Upon a Bureau determination that a beneficiary's disability has ceased, actual benefit payments are not terminated until two months after the month in which the disability is found to have ceased (42 U.S.C. 423(a)(1)(D); Claims Manual, § 6707). If benefits were suspended before being terminated, the beneficiary is nevertheless entitled to payments for all months through the second month after the month in which his disability is found to have ceased (*id.*).

Under the Act and regulations, a Bureau decision terminating (as opposed to suspending) a beneficiary's disability constitutes an "initial determination," which the beneficiary may challenge through the es-

tablished administrative and judicial hearing procedures (42 U.S.C. 421(d); 20 C.F.R. 404.905–404.951 and 404.1520–404.1522). These procedures, which are the same as those followed when the Bureau initially determines that an applicant is not disabled, entitle an aggrieved beneficiary, upon written requests filed within six months, to reconsideration of the initial determination and, after reconsideration, to a *de novo* evidentiary hearing (20 C.F.R. 404.909–404.940). A beneficiary is thereafter entitled, upon a written request filed within sixty days, to review of the hearing examiner's decision by the Appeals Council (20 C.F.R. 404.941–404.951), and to judicial review of the final administrative determination if he files suit in a federal district court within sixty days (42 U.S.C. 405 (g)).[19] If the initial determination of the Bureau of Disability Insurance is subsequently reversed and reinstatement of benefits is ordered, corrective payments back to the date of suspension or initial termination are made.

In sum, decisions regarding continuing disability are made first by the State agency and then by the Administration's Bureau of Disability Insurance; in these proceedings the Administration's district offices act in an investigatory capacity. During the proceedings, the Bureau, in order to prevent overpayments, may order suspension of disability benefits on its own initiative or upon the suggestion of the State

[19] A beneficiary may be represented before the Social Security Administration by any practicing attorney or other qualified person at any stage of the entire proceedings, including before an initial determination is made (20 C.F.R. 404.971–404.972).

agency or the district office. But suspension is simply a step frequently, but not always, taken while a decision is being reached regarding whether benefits should be terminated. Under the Act, the responsibility for making the initial decision on whether to terminate rests with the State agencies, subject to limited review at this stage by the Bureau of Disability Insurance. The decision itself rests upon verified wage postings to the beneficiary's account over a substantial period of time or upon medical reports indicating that the beneficiary has recovered. After the initial determination to terminate is made, the Bureau, upon the beneficiary's request, reconsiders the determination; and if the beneficiary is still dissatisfied he is then entitled to an evidentiary hearing before a hearing examiner.

In our memorandum in response to co-appellants' jurisdictional statement we pointed out that intervenor Atkins was the only party in this case who had had his benefits terminated (as distinguished from suspended), that his benefits had been reinstated before the district court's decision, and that the district court decided only the constitutionality of the suspension procedure. In view of this, we suggested that any question regarding the procedures for termination of benefits was moot. Compare *Messer* v. *Finch*, 314 F. Supp. 511 (E.D. Ky.), vacated and remanded for dismissal as moot, 400 U.S. 987.

However, since the procedures leading to suspension and those leading to termination, with or without a prior suspension, are the same, see pp. 11–18 *supra*, the district court's decision holding Section 225 unconstitutional necessarily affects both actions. Our

discussion, therefore, is not limited to the procedures for suspension since, in our view, this Court's determination of the constitutional adequacy of the procedures themselves would also affect both suspensions and terminations of benefits. In sum, although we would still contend that questions regarding termination procedures are moot if these were the only issues in the case, in the special circumstances presented here we believe that the constitutionality of the procedures both for suspension and termination must be considered. For these reasons, we withdraw our suggestion of mootness.

II. THE CONTINUING DISABILITY INVESTIGATION PROCEDURES SATISFY DUE PROCESS

Section 225 permits the Secretary to suspend disability benefit payments if, on the basis of evidence obtained by or submitted to him, he "believes that an individual entitled to [disability insurance] benefits * * * may have ceased to be under a disability," 42 U.S.C. 425, and benefits must be terminated if the Secretary finds that the beneficiary is in fact no longer under a disability, 42 U.S.C. 416(i)(2), 422(c), 423(a)(1). Section 225 was intended to protect the disability benefit program by giving the "Secretary ample power to administer the program on a careful, practical, and economical basis" (102 Cong. Rec. 13039 [remarks of Senator George]).[20] In order to effectuate these goals the Secretary adopted the

[20] See H.R. Rep. No. 1189, 84th Cong., 1st Sess., at p. 30 (1955).

procedures comprising the continuing disability investigation. These procedures therefore provide the basis upon which the constitutionality of Section 225 should be assessed, cf. *Rosado* v. *Wyman*, 397 U.S. 397, 415; *Zemel* v. *Rusk*, 381 U.S. 1, 11, and the framework within which the due process issue should be considered. See 42 U.S.C. 405(a).

Every claimant is advised when notified of the initial award of disability benefits that, if his condition improves to the extent that he is no longer unable to engage in substantial gainful employment, his benefits will cease.[21] Thereafter, upon receipt by the Social Security Administration of any information indicating that a beneficiary no longer is disabled, the beneficiary is personally interviewed by the district office or, under the experimental procedures applicable to wage postings or medical re-examinations, by mail by the Bureau of Disability Insurance or the State agency, respectively, in order to verify the information relating to his disability that the Administration has received.[22] At this time, the beneficiary is asked to furnish detailed information regarding his medical condition and work efforts. If wages have been posted to his account, he is asked to verify that those postings in fact reflect his earnings. Should there be indications that the beneficiary's condition

[21] This advice is contained in a pamphlet setting forth the rights and responsibilities of disability beneficiaries sent by the Social Security Administration to each beneficiary, a copy of which we have filed with the Court.

[22] See note 16 *supra*.

has improved, reports of any recent examinations are obtained from his physicians, and ordinarily he is also examined by a consultant physician. Only after it has been confirmed that a beneficiary has been working full time for a substantial period, has recovered, or has refused to cooperate will his benefits be suspended or terminated.[23]

In deciding to suspend or terminate benefits, the Secretary acts upon the basis of information of "reliability and impartiality" that has "probative worth" (*Richardson* v. *Perales*, 402 U.S. 389, 403, 405)—reports of earnings routinely submitted to the Administration and written medical reports by doctors who have examined the beneficiary. As we explain below, the beneficiary will be informed of the basis upon which the Administration is considering such action, and will be permitted to rebut the information.

We do not challenge the district court's decision insofar as it requires timely notice to the beneficiary of the proposed suspension and of the information on which it rests. In accordance with that decision, the Secretary, in order to afford reasonable notice and opportunity to participate in the determination proceedings, will adopt a procedure whereby the individual will be informed of the proposed adverse action and the information upon which it is based and will be given the opportunity to respond in writing before adverse action, if any, is taken.

We do, however, challenge the district court's hold-

[23] In addition, disability benefits are terminated for death or attainment of age 65 (in which case, old age benefits become payable). 42 U.S.C. 423(a)(1)(D).

ing that due process further requires a formal hearing whenever the beneficiary's evidence conflicts with the Administration's, and a somewhat less "formal" hearing before an "impartial decision maker," without medical personnel or employers required to be present, in all other cases (App. 99–101). For the reasons that follow, we also disagree with the contention that due process requires even more, that is, that in all cases it compels an evidentiary hearing of the same scope required for welfare recipients in *Goldberg* v. *Kelly*, 397 U.S. 254.

1. In many situations the right to a hearing comprehends an oral presentation at which the party may present evidence and confront and cross-examine witnesses. This is essentially what *Kelly* required with respect to the termination of welfare benefits, 397 U.S. at 266–271. But due process does not necessitate "judicializing" administrative action to this extent in all situations. See *United States* v. *Nugent*, 346 U.S. 1, 9. The requirements of due process "frequently vary with the type of proceeding involved," *Hannah* v. *Larche*, 363 U.S. 420, 440. In our view, due process can be satisfied in appropriate areas of administrative action if the party is given the opportunity to submit objections and arguments in writing. Whether such a "hearing on paper" is adequate depends on the nature of the evidence usually involved and on a reconciliation of the practical needs of administration with the interests of the party affected. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895; see generally Note, *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 326–334 (1971).

What matters is substance, not form. The proper inquiry is whether the party has been afforded a fair opportunity of correcting or contradicting anything prejudicial to his view before a decision is reached."[24] As to suspensions or terminations of disability benefits, where the information against the beneficiary is highly reliable and will be known to him, such a "fair opportunity" can be afforded through written submissions, without the need for oral presentation.[25] This opportunity before the disability determination is made, together with the right to reconsideration and a formal, evidentiary hearing after the determination (see pp. 17–18 *supra*), satisfies due process.

Where suspension or termination results from a medical determination that the disability has ceased, this rests upon reports of medical examinations whose reliability this Court recently recognized in *Richardson* v. *Perales*, 402 U.S. 389. There this Court held that written reports of licensed physicians who had examined the claimant could constitute substantial evidence supporting a determination of no disability,

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[24] "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis* v. *Ordean*, 234 U.S. 385, 394, "at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (quoted in *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 267).

[25] Compare *Gonzales* v. *United States*, 348 U.S. 407, 412, where the Selective Service Appeal Board, which classifies registrants *de novo* on the basis of written submissions, received a report from the Department of Justice. The Court held that the registrant need only be given a fair opportunity to reply in writing to the Justice Department's report, which was based in part on an interview of the registrant. See also *Simmons* v. *United States*, 348 U.S. 397.

even though the physicians had not testified and therefore could not be cross-examined. The Court based its decision on a number of factors that assured the underlying reliability and probative value of such reports, including the impartiality of the consulting physicians, and on the administrative burden in terms of cost and time that would result from requiring live testimony. 402 U.S. at 402–406. Similarly, the determination that the recipient has sufficient earnings to indicate that he is no longer disabled rests upon regular reports made by his employers to the government; the accuracy of these is verified by the beneficiary or his employer before the Administration acts. See p. 15 *supra*.

The basis upon which disability benefits are suspended or terminated thus differs significantly from that upon which the terminations of welfare benefits involved in *Goldberg* v. *Kelly, supra,* rested. The decision to terminate welfare benefits may result from personal and social situations brought to the attention of the authorities by tips, rumor or gossip. One of the recipients in *Kelly,* for example, had been cut off because of her alleged failure to cooperate with welfare authorities in suing her estranged husband; payments to another were terminated because of alleged drug addiction. 397 U.S. at 256, n. 2. Thus, the Court pointed out that "Particularly where credibility and veracity are at issue, as they must be in many [welfare] termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.* at 269. And in concluding that confrontation

and cross-examination are required, the Court, *id.* at 270, relied upon the following statement from *Greene* v. *McElroy*, 360 U.S. 474, 496–497,

> [T]he evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals where memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

While these observations describe the situation for termination of welfare benefits, they are wide of the mark with respect to suspension or termination of disability benefits. As we have indicated above, social security disability payments are suspended only on the basis of an objective consideration—that the previous disability has ceased—and that conclusion rests on reliable information.[26] The disability beneficiary is afforded a fair opportunity to controvert so long as he is given notice of it and can respond in writing, even with the assistance of counsel if he wishes. See note 19 *supra*. Unlike the situation in *Kelly*, the credibility or veracity of the doctors and employers, upon whose reports the proposed action is based, will not be in issue.

To be sure, of 38,000 determinations each year that a beneficiary's disability has ceased, 5000 or 13 percent

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[26] The Claims Manual specifically directs that "[b]enefits should not be suspended based solely on a report from an informant" (§ 6708).

are reversed upon reconsideration by the Bureau of Disability Insurance or after a hearing before a hearing examiner (App. B, *infra*, pp. 57–58). But this does not show that these determinations were based on unreliable evidence. Rather, these figures simply illustrate an obvious and unavoidable fact about all adjudications: judgments on the evidence will sometimes vary. Moreover, the fact that 37 percent of the 11,000 requests for reconsideration result in reversals by the Administration of the initial determination that disability has ceased "attests to the fairness of the system and refutes the implication of impropriety", as this Court pointed out in *Perales, supra,* 402 U.S. at 410, with respect to a comparable reversal rate for initial diasbility determinations. The fairness of having cessations of disability initially determined on the basis of written submissions is further illustrated by the fact that these reversals upon reconsideration are themselves based only on written submissions by the beneficiary (see 20 C.F.R. 404.913–404.914). Particularly in view of the vast disruption of the Social Security system that would result from requiring oral hearings before any suspension or termination of benefits (see below), the opportunity to make such written submissions fulfills the requirements of due process. See note, *supra,* 85 Harv. L. Rev. at 332–334.

2. Requiring that the beneficiary be permitted to participate in the pre-suspension determination proceedings in some more formal or comprehensive manner would require massive restructuring of the existing administrative adjudicative process. Cessation of

disability determinations are now made in two steps: initially by the State agency, after the Social Security Administration has conducted its investigation, and then by the Administration's Bureau of Disability Insurance on review. This arrangement not only makes possible the necessary concentration of personnel qualified to make the specialized medical and vocational evaluations required in disability cases, as Congress intended (see p. 11 *supra*), but also permits the Administration to staff its numerous district offices—which exceed 700—with individuals who, although trained to obtain medical and other relevant data from beneficiaries and claimants, do not have to be qualified to make medical judgments of the sort required in an adjudication of disability.

As noted above in point I, the district office on the basis of its investigation may recommend to the Bureau of Disability Insurance that the beneficiary's benefits be suspended, and the State Agency may make a like recommendation to the Bureau on the basis of its determination that the disability has ceased. The district office makes no finding that disability has ceased. Under the Act, that is reserved to the State agency and the Bureau of Disability Insurance, on the basis of which the latter may suspend and then terminate benefits or just terminate them. See 42 U.S.C. 421.

The district court ruling, however, would require that the beneficiary be allowed to participate in either the State agency determination proceedings or the decision of the Bureau of Disability Insurance, which is located in Baltimore, Maryland. It either would re-

quire the beneficiary to travel great distances or would necessitate that State or federal officials travel to the area in which the beneficiary resides, neither of which is practical. Nor could the decision-making function be turned over to the Administration's district offices, which are located conveniently to the beneficiaries, without staffing them with individuals qualified to make the necessary medical and vocational judgment. The district offices are already heavily overburdened and, cognizant of this, the Administration recently initiated experimental procedures in order to streamline disability investigations (see note 16 *supra*).

If the present system is revamped by turning over the decision-making function to the district offices, this would necessitate the duplication, on a vast scale, of the personnel already staffing State agencies, and would make uniformity and consistency in the administration of the program all but impossible. The district court's decision, or the position advocated by co-appellants, would therefore require vast revisions in the present procedures, which are designed to effectuate the statutory allocation of functions prescribed by Congress.[27] See 42 U.S.C. 421, and p. 11 *supra*.

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[27] In contrast to the Title II disability program involved here, which is a federally administered program, the program under Titles I, IV-A, X, XIV, XVI, and XIX of the Act, for which the Secretary has issued regulations requiring pre-termination hearings (45 C.F.R. 205.10, 36 Fed. Reg. 3034–3035), are all state programs administered by the state at the state and local level for which the federal government merely provides financial grants. The administration of Title II, a federal program, is centralized.

The adverse effects of the district court's decision, if upheld, would not be confined merely to the disability program. The non-disability programs administered under Title II of the Act by the Social Security Administration would similarly be severely disrupted. Pursuant to Section 203(h)(3) of the Act, 42 U.S.C. 403(h)(3), the benefits of an old age or other non-disability beneficiary may be suspended by the Secretary if he determines, on the basis of information obtained by or submitted to him, that the beneficiary's earnings may reasonably be expected to exceed the statutory ceiling. And under Section 204(a), 42 U.S.C. 404(a), when the Secretary finds that an overpayment has been made to any person under Title II, the Secretary shall require refunds or shall recoup the overpayment out of subsequent benefits due to the individual.

In each of these Title II non-disability programs, the decision-making process has been centralized in six payment centers located in New York, Philadelphia, Chicago, Birmingham, Kansas City and San Francisco. Therefore, affirmance of the district court holding may well require the wholesale reorganization of these programs in a manner similar to that which would be required for the disability program.

The burden that the rule announced by the district court would impose upon the Title II programs and the Social Security Administration would thus be enormous, both administratively and financially. In fiscal 1969, there were approximately 40,000 determinations that disability had ceased (App. 34). For fiscal 1971,

there were 3,167 cessations of disability per month, including 2000 suspensions of benefits. If suspensions were delayed for only 2 months, the cost per year would be nearly $5,000,0000; if terminations were delayed for the same period the cost per year would be nearly $16,000,000.[28] This money would have to come out of the Social Security Trust Fund, 42 U.S.C. 401, thereby reducing the amount available for payment of benefits.

But this is only the tip of the iceberg. The cost of decentralizing the disability program, of staffing more than 700 district offices with highly trained personnel and of conducting a vast number of additional evidentiary hearings must also be added. Moreover, as we have indicated above, the district court's decision has implications for all of the other programs under

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[28] The Social Security Administration has estimated the following for disability cases in 1971:

Suspensions per month under 42 U.S.C. 425	1,100
Reinstatements per month after suspensions	100
Cessations per month after suspensions	1,000
(Processing time between suspension of benefits and a restatement of cessation is 57 days)	
Cessations per month without prior suspensions	2,167
Total cessations per month	3,167
Average monthly benefit paid per terminated case	$207
Cost per year of delaying all suspensions for 1 month (1,000 cases × $207 per month × 12 months)	$2,484,000
Cost per year of delaying all suspensions for 2 months (1,000 cases × 2 × $207 per month × 12 months)	$4,968,000
Cost per year of delaying all cessations for 1 month (3,167 cases × $207 × 12)	$7,866,828
Cost per year of delaying all cessations for 2 months (3,167 cases × 2 × $207 × 12)	$15,733,656

See also App. 34, where the Administration estimated the cost of delay for 1 month as approximately $10,000,000.

Title II in addition to the disability benefit program. The total number of terminations of benefits in 1969 for all Title II programs likely to be affected by the district court's decision was 515,189, including 38,000 cessations of disability.[29] It is apparent that the cost of delaying even a small percentage of this number of terminations of benefits per year, not to mention the cost of revamping the structure of the Social Security

[29] Social Security Bulletin, Annual Supplement at p. 111:

TABLE 108.—BENEFITS TERMINATED: NUMBER, BY REASON FOR TERMINATION AND TYPE OF BENEFICIARY, 1969

Reason for termination	Total	Retired workers	Disabled workers	Wives and husbands	Children	Widowed mothers	Widows and widowers	Parents	Special age-72 beneficiaries
Total	2,980,287	827,151	251,269	299,889	946,481	107,119	205,188	3,525	119,865
Death of beneficiary	1,285,744	778,284	108,762	90,294	9,976	3,012	182,204	3,462	109,800
Death of spouse or disability beneficiary	264,291			206,794	57,597				
Marriage, remarriage, or divorce of beneficiary	99,282			3,474	53,254	30,556	11,978	10	
Marriage, death, or adoption of last entitled child	7,032			3,122		3,910			
Attainment of age 18 by beneficiary	298,699				298,699				
Attainment of age 65 by disability beneficiary	123,530		93,465	17,766	12,299				
Attainment of age 18 by last entitled child	107,486			44,622		62,864			
Entitlement to equal or larger benefits [1]	109,581	29,242		12,208	15,927	4,437	28,352	21	9,394
Recovery [2] of disability beneficiary or of last entitled child	99,735		38,108	13,464	47,826	241	96		
Recovery [2] of disabled child	1,592				1,592				
Withdrawal of application	6,506	4,920	51	736	584	60	229	1	15
Attainment of age 22 by student	68,981				68,981				
Beneficiary no longer a full-time student	222,840				222,840				
Other	84,708	4,725	10,883	7,229	44,805	2,939	2,329	31	656

[1] Benefits payable to retired workers aged 62-64 pending determination of disability upon entitlement to a higher benefit.

[2] Disabled person ceased to meet medical standards for disability or continued to meet medical standards for disability but engaged in substantial gainful activity.

In reaching the figure of 515,189 in the text, we have subtracted all terminations for death, attainment of age 18, 22 or 65, withdrawal of application, or entitlement to equal or larger benefits, since in our view the district court's decision would have little effect on the processing of these cases.

program to comply with the district court's order, would be very great.

The Social Security Administration is no less concerned than are the co-appellants about fair treatment of the beneficiaries for whom it administers the disability program. But it is also concerned with the practical needs of administration, with the necessity for efficient and effective operation of a vast benefit program affecting millions of persons and involving millions of determinations each year. As this Court recognized in *Perales, supra*, 402 U.S. at 399, "Such a system must be fair—and it must work."

We do not suggest that the district court's decision will necessarily cause a collapse in the administration of the disability benefit program, or of Title II programs in general. But the Constitution does not require that additional procedures must be engrafted on a functioning program until the brink is reached. The important issue is whether, in light of the nature of the evidence involved and a reconciliation of the interests of the persons affected with administrative interests, due process is satisfied by a procedure that affords each beneficiary adequate notice of the proposed suspension or termination and the evidence on which this is based, together with the opportunity to contradict or contest this in writing before adverse action is taken. In the circumstances of disability determinations, we submit, due process requires no more.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed insofar as it requires an oral hearing before disability benefits can be suspended or terminated.

Respectfully submitted.

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DECEMBER 1971.

APPENDIX A

42 U.S.C. (1970 ed.) 425 provides:

§ 425. Suspension of benefits based on disability.

If the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to benefits under section 423 of this title, or that a child who has attained the age of eighteen and is entitled to benefits under section 402(d) of this title, or that a widow or surviving divorced wife who has not attained age 60 and is entitled to benefits under section 402(e) of this title, or that a widower who has not attained age 62 and is entitled to benefits under section 402(f) of this title, may have ceased to be under a disability, the Secretary may suspend the payment of benefits under such section 402(d), 402(e), 402(f) or 423 of this title until it is determined (as provided in section 421 of this title) whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased. In the case of any individual whose disability is subject to determination under an agreement with a State under section 421(b) of this title, the Secretary shall promptly notify the appropriate State of his action under this section and shall request a prompt determination of whether such individual's disability has ceased. For purposes of this section, the term "disability" has the meaning assigned to such term in section 423(d) of this title. When-

ever the benefits of an individual entitled to a disability insurance benefit are suspended for any month, the benefits of any individual entitled thereto under subsection (b), (c), or (d) of section 402 of this title, on the basis of the wages and self-employment income of such individual, shall be suspended for such month. The first sentence of this section shall not apply to any child entitled to benefits under section 402(d) of this title, if he has attained the age of 18 but has not attained the age of 22, for any month during which he is a full-time student (as defined and determined under section 402 (d) of this title).

20 C.F.R. (1971 rev.) Part 404 provides in relevant part:

§ 404.905 Administrative actions that are initial determinations.

* * * * *

(d) *Termination of monthly benefits or periods of disability.* The Administration (or, in a disability claim, a State agency when required by a Federal-State agreement pursuant to section 221(b) of the Act) shall, with respect to a party who has been determined to be entitled to monthly benefits, or a period of disability, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether, under the applicable provisions of title II of the Act, such party's entitlement to monthly benefits, or a period of disability, has ended and, if so, the last month of such entitlement or period of disability. Such findings of fact and determination shall be made whenever it appears to the Administration that such party's entitlement to monthly benefits, or a period of disability, has ended. The suspension of benefits pursuant to section 202(t) of

the Act shall be considered to be a termination thereof for purposes of this section.

§ 404.906 Administrative actions which are not initial determinations.

Administrative actions which shall not be considered initial determinations under any provision of the regulations in this Subpart J, but which may receive administrative review, include, but are not limited to, the following:

(a) The suspension of benefits pursuant to section 203(h)(3) of the Act pending investigation and determination of any factual issue as to the applicability of a deduction or deductions under section 203(b) of the Act.

(b) The suspension of benefits pursuant to section 225 of the act pending investigation and determination as to the cessation of the disability of an individual entitled to benefits under section 202(d) or 223 of the act.

* * * * *

(e) The withholding by the Administration in any month, for the purpose of recouping an overpayment, of less than the full amount of the monthly benefit otherwise payable in that month (see § 404.502).

* * * * *

§ 404.907 Notice of initial determination.

Written notice of an initial determination shall be mailed to the party to the determination at his last known address, except that no such notice shall be required in the case of a determination that a party's entitlement to benefits has ended because of such party's death (see § 404.905(d)). If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a party's entitlement to benefits has ended, or

that a reduction, deduction, or adjustment is to be made in benefits or a lump sum, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination. Such notice shall also inform the party of the right to reconsideration (see § 404.910) unless such determination is to the effect that a deduction, or, except in disability claims, a termination, is to be made and such determination is based only upon facts reported to the Administration by the party to the determination. Notice of termination because of cessation of disability shall inform the party to the determination of the right to reconsideration, even where the termination was based on a report to the Administration by the party to the determination that his condition improved or that he returned to work.

§ 404.908 Effect of initial determination.

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910–404.916, or it is revised in accordance with § 404.956.

§ 404.909 Reconsideration and hearing.

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatisfied with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917.

§ 404.910 Reconsideration; right to reconsideration.

The Administration shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 404.911, by or for the party to the initial determination (see § 404.905). The Administration shall also reconsider an initial determination (unless the determination is with respect to the revision of the Administration's earnings records) if a written request for reconsideration is filed, as provided in § 404.911, by an individual as a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital or supplementary medical insurance benefits, may be prejudiced by such determination. The Administration shall also reconsider an initial determination relating to the revision of the Administration's record of the earnings (see § 404.905 (g)) of a deceased individual if a written request for reconsideration is filed, as provided in § 404.911, by a person as a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, an individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate.

§ 404.911 Time and place of filing request.

The request for reconsideration shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines or, in the case of an individual having 10 or more years

of service in the railroad industry (see Subpart O of this Part 404) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing reconsideration with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board, within 6 months from the date of mailing notice of the initial determination, unless such time is extended as provided in § 404.612 or § 404.953.

* * * * *

§ 404.914 Reconsidered determination.

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and 404.911, reconsider the initial determination in question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

§ 404.915 Notice of reconsidered determination.

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the basis therefor and inform the parties of their right to a hearing (see §404.917).

§ 404.916 Effect of reconsidered determination.

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956.

§ 404.917 Hearing; right to hearing.

An individual has a right to a hearing about any matter designated in § 404.905, if:

(a) An initial determination and a reconsideration of the initial determination have been made by the Administration; and

(b) The individual is a party referred to in § 404.919 or § 404.920; and

(c) The individual has filed a written request for a hearing under the provisions described in § 404.918.

§ 404.918 Time and place of filing request.

The request for hearing shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines, or with a hearing examiner, service in the railroad industry (see Sub-or the Appeals Council or, in the case of an individual having 10 or more years of part O of this part) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing a hearing with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board. The request for hearing must be filed within 6 months after the date of mailing notice of the reconsidered determination to such individual, except where the time is extended as provided in § 404.612 or § 404.954.

* * * * *

§ 404.939 Hearing examiner's decision or certification to Appeals Council.

As soon as practicable after the close of a hearing, the hearing examiner, except as herein provided, shall make a decision in the case or certify the case with a recommended decision to the Appeals Council for decision (see

§§ 404.942–404.944). If the hearing examiner makes a decision in the case, such decision shall be based upon the evidence adduced at the hearing (§§ 404.923 to 404.933, inclusive) or otherwise included in the hearing record (see § 404.934). The decision shall be made in writing and contain findings of fact and a statement of reasons. A copy of the decision shall be mailed to the parties at their last known addresses.

§ 404.940 Effect of hearing examiner's decision.

The hearing examiner's decision, provided for in § 404.939, shall be final and binding upon all parties to the hearing unless it is reviewed by the Appeals Council (see §§ 404.948–404.950) or unless it is revised in accordance with § 404.956. If a party's request for review of the hearing examiner's decision is denied (see § 404.947) or is dismissed (see § 404.952), such decision shall be final and binding upon all parties to the hearing unless a civil action is filed in a district court of the United States, as is provided in section 205(g) of the act, or unless the decision is revised in accordance with § 404.956.

§ 404.941 Removal of hearing to Appeals Council.

The Appeals Council on its own motion may remove to itself any request for hearing pending before a hearing examiner. The hearing on any matter so removed to the Appeals Council shall be conducted in accordance with the requirements of §§ 404.924 to 404.938, inclusive. Notice of such removal shall be mailed to the parties at their last known addresses.

* * * * *

§ 404.945 Right to request review of hearing examiner's decision or dismissal.

If a hearing examiner has made a decision, as provided in § 404.939, or dismissed a request

for hearing, as provided in §§ 404.935 through 404.937, any party thereto may request the Appeals Council to review such decision or dismissal.

§ 404.946 Time and place of filing request.

The request for review shall be made in writing and filed with an office of the Administration, or in the case of an individual in the Philippines, with the Veterans' Administration Regional Office in the Philippines, or with a hearing examiner, or the Appeals Council, or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart Q of this part) or an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing review with respect to his application to establish a period of disability under section 216(i) of the act at an office of the Railroad Retirement Board. Such request shall be accompanied by whatever documents or other evidence the party desires the Appeals Council to consider in its review. The request for review must be filed within 60 days from the date of mailing notice of the hearing examiner's decision or dismissal, except as provided in § 404.612 or § 404.954.

* * * * *

§ 404.1520 Determinations of disability.

(a) *By State agencies.* In any State which has entered into an agreement with the Secretary providing therefor, determinations as to whether an individual is under a disability (as defined in § 404.1501), as to the date disability began, and as to the date disability ceases, shall

be made by the State agency or agencies designated in such agreement on behalf of the Secretary with respect to all individuals in such State, or with respect to such class or classes of individuals in the State as may be designated in the agreement.

(b) *By the Administration.* Determinations as to whether an individual is under a disability, as to the date disability began, and as to the date disability ceases, shall be made by the Administration on behalf of the Secretary with respect to individuals in any State which has not entered into an agreement, any class or classes of individuals not designated in such an agreement or any individuals outside the United States.

(c) *Review by Administration of State Agency determinations.* The Administration may review a determination made by a State agency that an individual is under a disability and, as a result of such review, may determine that such individual is not under a disability, or that the disability began on a date later than that determined by the State agency, or that the disability ceased on a date earlier than that determined by the State agency.

§ 404.1521 Initial determinations as to entitlement or termination of entitlement.

After any determination as to whether an individual is under a disability or has ceased to be under a disability, the Administration will make an initial determination (see § 404.905) with respect to entitlement to a period of disability or to disability insurance benefits or child's, widow's or widower's insurance benefits based on disability.

§ 404.1522 Reconsideration, hearing and review.

Reconsideration, hearing and review of any initial determination referred to in § 404.1521 may be requested by a party who is dissatisfied with such determination, in accordance with the provisions of Subpart J of this part (see particularly § 404.909 et seq.). A final decision of the Secretary is subject to judicial review upon the filing of a civil action in a U.S. district court in accordance with section 205(g) of the Act (see § 404.954).

§ 404.1523 Evidence of disability.

An individual who has filed an application for the establishment of a period of disability or for disability insurance benefits or child's, widow's or widower's insurance benefits based on disability, shall submit medical evidence showing the nature and extent of such individual's impairment or impairments during the time he alleges he was under a disability. Upon request, the applicant shall also submit evidence as to his education and training, work experience, and daily activities both prior to and after the alleged date of onset of disability, efforts to engage in gainful employment or self-employment and any other pertinent evidence showing the effect of his impairment or impairments on his ability to engage in any substantial gainful activity during the time he alleges he was under a disability. An applicant for benefits based on statutory blindness shall, upon request, submit evidence as to the skills and abilities required in any gainful activity in which he had previously engaged, the length of time and regularity of such previous work activity, and as to his inability to utilize such skills and abilities in substantial gainful activity (see § 404.1501(a)(1)(ii)).

* * * * *

§ 404.1527 Consultative examinations.

Upon reasonable notice of the time and place thereof, any individual alleged to be under a disability shall present himself for and submit to physical or mental examinations or tests, at the expense of the Administration, by a physician or other professional or technical source designated by the Administration or the State agency authorized to make determinations as to disability. If any such individual fails or refuses to present himself for any examination or test, such failure or refusal, unless the Secretary determines that there is good cause therefor, shall be a basis for determining that such individual is not under a disability. Religious or personal scruples against medical examination or test shall not excuse an individual from presenting himself for a medical examination or test.

§ 404.1528 Evidence of continuation of disability.

An individual for whom a period of disability has been established or who has been determined to be entitled to disability insurance benefits or to child's, widow's or widower's insurance benefits based on disability, upon reasonable notice, shall, if requested to do so, present himself for and submit to examinations or tests as provided in § 404.1527, and shall submit medical reports and other evidence necessary for the purposes of determining whether such individual continues to be under a disability.

* * * * *

§ 404.1531 Responsibility to give notice of event which may effect a change in disability status.

An individual for whom a period of disability has been established or who is entitled to disability insurance benefits or to child's,

widow's or widower's insurance benefits based on disability, shall notify the Administration promptly if:

(a) His condition improves;

(b) He engages in any work activity or there is an increase in the amount of such activity or his earnings therefrom; or

(c) He has been in a hospital or similar institution and is discharged therefrom.

§ 404.1532 Evaluation of work activities.

(a) *In general.* If an individual performed work during any period in which he alleges that he was under a disability as defined in § 404.1501, the work performed may demonstrate that such individual has ability to engage in substantial gainful activity. If the work performed establishes that an individual who is not statutorily blind is able to engage in substantial gainful activity, he is not under a disability. (For the statutorily blind, see paragraph (g) of this section.) Work which does not in itself constitute substantial gainful activity, may nevertheless indicate the existence of a residual capacity of such individual to engage in substantial gainful activity. Thus, an individual who utilizes work skills or abilities on a limited basis may not be under a disability if he is capable of increased utilization of such work skills or abilities.

(b) *Substantial gainful activity defined.* Substantial gainful activity refers to work activity that is both substantial and gainful. Substantial work activity involves the performance of significant physical or mental duties, or a combination of both, productive in nature. Gainful work activity is activity for remuneration or profit (or intended for profit, whether or not a profit is realized) to the individual performing it or to the persons, if any, for whom it is performed, or of a nature generally performed for remuneration or profit. In order for work ac-

tivity to be substantial, it is not necessary that it be performed on a full-time basis; work activity performed on a part-time basis may also be substantial. It is immaterial that the work activity of an individual may be less, or less responsible, or less gainful, than that in which he was engaged before the onset of his impairment.

(c) *Nature of the work.* The performance of duties involving skill, experience or responsibility, or contributing substantially to the operation of an enterprise is evidence tending to show that an individual has ability to engage in substantial gainful activity.

(d) *Adequacy of performance.* The adequacy of an individual's performance of assigned work is also evidence as to whether or not he has ability to engage in substantial gainful activity. The satisfactory performance of assignments may demonstrate ability to engage in substantial gainful activity, while an individual's failure, because of his impairment, to perform ordinary or simple tasks satisfactorily without supervision or assistance beyond that usually given other individuals performing similar work, may constitute evidence of an inability to engage in substantial gainful activity. "Made work," that is, work involving the performance of minimal or trifling duties which make little or no demand on the individual and are of little or no utility to his employer, or to the operation of a business, if self-employed, does not demonstrate ability to engage in substantial gainful activity.

(e) *Special employment conditions.* Work performed under special conditions of employment which take account of the employee's impairment (for example, work in a sheltered workshop or in a hospital by a patient) may, nonetheless, provide evidence of skills and abilities that demonstrate an ability to engage in a

substantial gainful activity, whether or not such work in itself constitutes substantial gainful activity (see § 404.1534 (b) and (c)).

(f) *Activities in carrying on a trade or business.* Supervisory, managerial, advisory or other significant personal services rendered by a self-employed individual demonstrate an ability to engage in substantial gainful activity.

(g) *Work activity of blind applicants.* The work of an applicant for disability insurance benefits who has not attained age 55 and has applied for benefits based on statutory blindness is evaluated to determine whether he is able to engage in substantial gainful activity. If he has attained age 55, his work is evaluated also to determine whether he is utilizing skills or abilities comparable to those of any gainful activity in which he had previously engaged with some regularity over a substantial period of time. If his work establishes that he is able to engage in substantial gainful activity, and (if he has attained age 55) also that he is utilizing such skills or abilities or can utilize them therein, he is not under a disability for the purposes of disability insurance benefits (see § 404.1501 (a)(1)(ii)).

§ 404.1533 Time spent in work.

If the time that an individual spends in work activities is comparable to the time customarily spent by individuals without impairment in similar work activities as a regular means of livelihood, his ability to work for such periods constitutes evidence tending to show an ability to engage in substantial gainful activity. Moreover, where an individual, because of his impairment, is unable to spend as much time in work activities as is customarily spent by individuals without impairment in similar work, but such individual is able to perform significant duties on a part-time basis, his ability to

work on a part-time basis also tends to show an ability to engage in substantial gainful activity.

§ 404.1534 Evaluation of earnings from work.

(a) *General.* Where an individual who claims to be disabled engages in work activities, the amount of his earnings from such activities may establish that the individual has the ability to engage in substantial gainful activity. Generally, activities which result in substantial earnings would establish ability to engage in substantial gainful activity; however, the fact that an individual's activities result in earnings which are not substantial does not establish the individual's inability to engage in substantial gainful activity. Where an individual is forced to discontinue his work activities after a short time because his impairment precludes continuing such activities, his earnings would not demonstrate ability to engage in substantial gainful activity. Also a mentally handicapped individual who performs simple tasks subject to close and continuous supervision would not have demonstrated ability to engage in substantial gainful activity solely on the basis of the rate of his remuneration for such activity. Extraordinary expenses incurred by an individual in connection with his employment and because of his impairmen (e.g., the nature of the impairment requires special transportation) shall be deducted, to the extent that such expenses exceed what would be his work-related expenses if he were not impaired, in computing the value of his earnings. Expenses for medication or equipment which the individual requires whether or not he works would not, of course, be work-related. Earnings received by an employee which are not attributable to his work activity are not considered in determining his ability to engage in substantial gainful activity. Thus, where an individual engages in work activity as an employee under special

conditions (see § 404.1532(e)), only earnings attributable to the individual's productivity, as distinguished from a subsidy related to other factors (e.g., his financial needs), are considered in determining his ability to perform substantial gainful activity. The fact, however, that a sheltered workshop or comparable facility may operate at a deficit and receive some charitable contributions or governmental aid would not necessarily establish that a particular employee of the workshop is not earning the amounts paid to him.

(b) *Earnings at a monthly rate in excess of $140.* An individual's earnings from work activities averaging in excess of $140 a month shall be deemed to demonstrate his ability to engage in substantial gainful activity unless there is affirmative evidence that such work activities themselves establish that the individual does not have the ability to engage in substantial gainful activity under the criteria in §§ 404.1532 and 404.1533 and paragraph (a) of this section.

(c) *Earnings at a rate of $90 to $140 a month.* Where an individual's earnings from work activities average between $90 and $140 a month, consideration of the amount of his earnings together with the other circumstances relating to his work activities (see §§ 404.1532 and 404.1533), the medical evidence relating to his impairment or impairments, and other factors (see § 404.1502) shall determine whether such individual is able to engage in substantial gainful activity. However, in the case of an individual working in a sheltered workshop (such as a workshop especially organized for the blind) or comparable facility, whose activities are limited by his impairment so that his earnings average $140 a month or less, such activities and such earnings ordinarily would not establish the ability to engage in substantial gainful activity.

(d) *Earnings at a monthly rate of less than $90.* Earnings from work activities as an employee which average less than $90 a month do not show that the individual is able to engage in substantial gainful activity. However, an evaluation of the work performed (see § 404.1532) may establish that the individual is able to engage in substantial gainful activity, regardless of the amount of his average monthly earnings.

(e) *Factors considered where individual is self-employed.* The earnings or losses of a self-employed individual often reflect factors other than the individual's work activities in carrying on his trade or business. For example, a business may have a small income or may even operate at a loss even though the individual performs sufficient work to constitute substantial gainful activity. Thus, less weight is given to such small income or losses in determining a self-employed individual's ability to engage in substantial gainful activity, and greater weight is given to such factors as the extent of his activities and the supervisory, managerial, or advisory services rendered by him (see § 404.1532(f)).

§ 404.1536 Period of trial work.

(a) *General.* Any services rendered by an individual entitled to disability insurance benefits, or child's insurance benefits based on disability, during a period of trial work shall nevertheless be deemed not to have been rendered, for the purpose of determining whether such individual's disability ceased during such period of trial work. Services rendered within a period of trial work may be considered, however, in determining whether an individual's disability ceased at any time after the expiration of such period of trial work.

(b) *Widow's and widower's insurance benefits based on disability.* The trial work period

provision described in this section is not applicable in the case of widows and widowers entitled to benefits (based on their disability) under section 202 (e) and (f) of the Act.

(c) *Duration.* A period of trial work for any individual shall begin with the month in which the individual becomes entitled to disability insurance benefits or to child's insurance benefits based on disability: *Provided*, That such period shall not begin earlier than October 1960, or before the month in which application is filed for such benefits, and shall end with the close of whichever of the following calendar months is the earlier:

(1) The 9th month (whether or not consecutive), beginning on or after the first day of such period, in which the individual renders any services, or

(2) The month in which the individual's disability (as defined in § 404.1501(a)) ceases, as determined without regard to work performed during the period of trial work.

(d) *Meaning of "services."* When used in this section "services" means any activity, even though not substantial gainful activity, which is performed by an individual in employment during a period of trial work for remuneration or gain, or which, is determined to be of a type normally performed for remuneration or gain. Work performed without remuneration merely as a therapeutic measure or purely as a matter of training, or work usually performed in daily routine around the home or in self-care, is not considered "services."

(e) *Trial work for certain individuals who have attained age 55 and who are statutorily blind.* An individual who has been determined to be under a disability as defined in § 404.1501 (a)(1)(ii) shall receive cash benefits during a trial work period only if:

(1) The work in which he engages requires skills or abilities comparable to those required

in the work he regularly engaged in prior to blindness or age 55, whichever is later, or

(2) His last previous work ended because of an impairment and the work he engages in requires a significant vocational adjustment.

§ 404.1537 Limitations of eligibility to period of trial work.

(a) *Number of periods of trial work.* An individual is not eligible for more than one period of trial work in any one period of entitlement to disability insurance benefits or child's insurance benefits based on disability.

(b) *Beneficiary who did not serve waiting period.* An individual determined to be under a disability who becomes entitled to disability insurance benefits after previously having been entitled to such benefits which terminated, or to a period of disability which ceased, within the 60-month period preceding the first month in which he is under such disability, and who therefore is not required to serve a waiting period (see section 223(c)(2) of the Act), shall not be eligible for a period of trial work with respect to such entitlement period.

§ 404.1538 Recovery from impairment while working.

An individual's disability may be found to have ceased at any time within a period of trial work (see § 404.1536), if it is determined on the basis of evidence (other than evidence that the individual performed services during such time) that the individual is no longer statutorily blind or has recovered from his physical or mental impairment to the extent that he is no longer prevented by his impairment or impairments from engaging in substantial gainful activity.

§ 404.1539 Cessation of disability.

Where it has been determined that an individual is under a disability as defined in § 404.

1501, the disability shall be found to have ceased:

(a) In the case of an individual entitled to disability insurance benefits or child's insurance benefits based on disability, in the earlier of the following:

(1) The month in which the impairment, as established by the medical or other evidence, is no longer of such severity as to prevent him from engaging in any substantial gainful activity or, in the case of disability under § 404.1501 (a)(1)(ii), no longer constitutes statutory blindness; or

(2) The month in which the individual has regained his ability to engage in substantial gainful activity, or, in the case of disability under § 404.1501(a)(1)(ii), to utilize in substantial gainful activity skills or abilities comparable to those of some gainful activity in which he had previously engaged with some regularity over a substantial period of time, as demonstrated by work activity after application of the provisions in § 404.1536; or

(b) In the case of an individual entitled to widow's or widower's benefits, in the earlier of the following:

(1) The month in which such individual's impairment improves to the point where it no longer constitutes an impairment listed in the appendix to this subpart, or is medically the equivalent thereof: or

(2) The month in which the individual engages in substantial gainful activity.

(c) In any case, where the individual is requested to furnish necessary medical or other evidence or to present himself for a necessary physical or mental examination by a date specified in the request and the individual fails to comply with such request, the month within which the date for compliance falls, unless the secretary determines that there is good cause for such failure.

Where an individual's entitlement to disability insurance benefits is terminated based on a finding that he has regained his ability to engage in substantial gainful activity, a period of disability established for him will continue if he has a visual impairment sufficiently severe to meet the definition of blindness in § 404.1501 (b) (1) (ii) and (2) (ii).

APPENDIX B

The Social Security Administration has compiled the following statistics for fiscal 1971:

A. Total Disability Claims:

(1) Number of disability claims filed	975, 856
Number of disability claims processed	950, 571
(2) Number of disability claims allowed initially	393, 464
(3) Number of disability claims denied initially	557, 107
(4) Number of reconsideration requests filed	148, 924
Number of reconsideration requests processed	127, 801
(5) Number of affirmances on reconsideration	79, 585
(6) Number of reversals on reconsideration	48, 216
(7) Number of hearing requests filed	39, 800
Number of hearing requests processed	37, 589
(8) Number of affirmances on hearing	21, 484
(9) Number of reversals on hearing	16, 105
(10) Number of requests for Appeals Council review filed	9, 664
Number of requests for Appeals Council review processed	8, 849
(11) Number of affirmances by the Appeals Council	8, 058
(12) Number of reversals by the Appeals Council	791
(13) Number of civil actions filed	1, 423
Number of civil actions decided	1, 282
(14) Number of district court affirmances	665
(15) Number of district court reversals	160
(16) Number of district court remands (followed by 88A allowance)	297
(17) Other district court dispositions (e.g., dismissals for untimely filing, failure to exhaust administrative remedies)	150

B. Disability Cessations:

(1) Number of initial determinations of cessation	38, 000
(2) Number of requests for reconsideration from cessation determinations processed	10, 941
(4) Number of affirmances of cessation on reconsideration	6, 885
(4) Number of reversals of cessation on reconsideration	4, 056
(5) Number of hearing requests on cessation (processed and pending)	2, 330
(6) Number of affirmances at hearing on cessation	890
(7) Number of reversals at hearing on cessation	1, 062
Number of reversals at hearing pending	358

B. Disability Cessations—Continued

(8) Number of requests for Appeals Council review on cessation (processed and pending)	**131**
(9) Number of Appeals Council affirmances on cessation	**8**
(10) Number of Appeals Council reversals on cessation	**12**
Number of Appeals Council reversals pending	**111**

APPENDIX C

ROANOKE, VA.,
June 9, 1971.

DISTRICT OFFICE,
Social Security Administration,
Roanoke, Va.

Gentlemen: On this date I accepted a Civil Service Job which pays $8,500 per annum. My Social Security number is 246–12–5511.

In view of the fact that this is my first employment since I was discharged from the V.A. Hospital, Salem, Va., I request that I be allowed to enter into a trial work period for the next nine months.

Sincerely,

JOHN D. ATKINS, Jr.

U.S. GOVERNMENT PRINTING OFFICE: 1971

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5211

RADIE P. WRIGHT and CLARA LITTLE WRIGHT, on Their Own Behalf and as Next of Friend to Their Infant Child CLARENCE EDWARD, and JOHN DILLARD ATKINS, JR., and on Behalf of All Others Similarly Situated,

Appellants,

vs.

ELLIOT L. RICHARDSON, Individually and in His Capacity as Secretary of Health, Education and Welfare,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF STELLA VAN GUILDER AND DOROTHY E. HOPKINS AS AMICI CURIAE ON BEHALF OF APPELLANTS

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Appellee.

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for the District of Columbia

BRIEF OF STELLA VAN GUILDER AND DOROTHY E. HOPKINS AS AMICI CURIAE ON BEHALF OF APPELLANTS

STATEMENT OF INTEREST OF AMICI CURIAE

Stella Van Guilder and Dorothy E. Hopkins respectfully file this joint brief as amici curiae in support of Radie P. Wright, et al., the appellants in docket number 70-5211, and in support of the proposition that beneficiaries of Old Age (retirement), Survivors, and Disability Insurance (OASDI) payments under Title II of the Social Security Act must be afforded the opportunity for an evidentiary

hearing prior to the termination, suspension, or reduction of OASDI payments. Thus, they seek reversal of the District Court judgment in this case insofar as it fails to provide for an opportunity for such a hearing. The requisite consents to the filing of this brief have been obtained and filed with the Clerk pursuant to Rule 42 of the Supreme Court Rules.

The interest of Stella Van Guilder and Dorothy E. Hopkins in this case arises from the fact that they are parties plaintiff to cases presently pending in the United States District Courts for the District of Minnesota and the Eastern District of Pennsylvania, respectively: *Van Guilder, et al. v. Richardson* (D. Minn. Civil No. 4-70-386); *Hopkins, et al. v. Richardson* (E.D. Pa., Civil No. 71-37). Their interest in this case is attested to by the fact that the Secretary of Health, Education and Welfare (hereinafter "the Secretary") in his appeal of the District Court judgment has alluded in his Jurisdictional Statement to both of their pending cases as demonstrating the significance of the issues in this case. *See* Appellant's Jurisdictional Statement in docket number 70-161 at page 7, footnote 8. Their interest is further attested to by the Secretary in that he has moved the courts in both of their pending cases for stays of proceedings to await the disposition of this case by the Court.

In their complaints the amici raise the issue of whether OASDI beneficiaries must be afforded the opportunity for an evidentiary hearing prior to the suspension or reduction of their payments, pursuant to section 204(a) of the Social Security Act (hereinafter, "Act"), 42 U.S.C. §404(a), in order to recoup alleged overpayments of such benefits. This case involves the constitutionality of the suspension, pur-

suant to section 225 of the Act, 42 U.S.C. §425, of Disability Insurance benefits without a prior evidentiary hearing. Although different sections of the Act are involved, amici contend that the broader due process issue is common to all the cases. The amici are particularly affected by the holding of the District Court in this case that presuspension evidentiary hearings are not required in Title II Disability Insurance cases and its suggestion that something analogous to the Social Security Administration's existing review procedure would satisfy the requirements of due process of law in such cases. Since it is the existing decision-making and review procedure which the amici attack as constitutionally deficient in their pending cases, they feel that an affirmation of the District Court judgment in this case would have an adverse bearing on their pending cases.

In their cases the amici have engaged in extensive discovery with reference to the Social Security Administration's decision-making and review procedure. In light of the fact that the District Court in this case found this procedure to be constitutionally sufficient amici feel that it is particularly appropriate to bring to the attention of this Court the results of their discovery. These facts will demonstrate that the Social Security Administration's present decision-making and review procedure is rife with error and unconscionable delay.

ARGUMENT

The appeal in this case raises the issue of whether the Social Security Administration must afford an opportunity for an evidentiary hearing to Disability Insurance beneficiaries under Title II of the Social Security Act prior to the suspension of benefits pursuant to section 225 of the Act, 42 U.S.C. §425. This section allows the Secretary to suspend the payment of benefits upon the belief that the individual's disability might have ceased. The suspension is in effect until it is determined whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased. 42 U.S.C. §425. Because a section 225 suspension is not an "initial determination", it is not reviewable. See 20 C.F.R. §§404.905(d), 404.906(b), and 404.909. Administrative review pursuant to the procedure set forth in 20 C.F.R., Part 404, Subpart J, may be had only after an "initial determination" terminating benefits on the ground that the disability has ceased.

The District Court held that,

> "The ex-parte suspension power granted to the Secretary by section 225 is summary adjudication that is inconsistent with the requirements of due process. A disability beneficiary must be given adequate notice and an opportunity to participate in the determination proceedings prior to the suspension of benefits." 321 F. Supp. 383, 386.

Accordingly, the Court declared section 225 of the Act to be unconstitutional and ordered the adoption of presuspension procedures which afford fundamental due process of law to Disability Insurance beneficiaries. With this conclusion the amici have no quarrel. They do dispute, how-

ever, the District Court's suggestion that some procedure analogous to that followed by the Secretary upon reconsideration of an administrative determination to terminate benefits[1] is constitutionally adequate if implemented prior to the suspension of benefits. 321 F. Supp. at 387, n. 18. Amici contend that the facts they have discovered reveal this procedure to be replete with errors and characterized by unjustifiable delay. The result of this procedure is that the aged, widows, orphans, and the disabled, whose chief source of income is likely to be Title II benefits, see *infra* at page 12, undergo months of severe hardship awaiting correction of administrative errors. Thus the amici take the position stated by Senior District Judge Matthews in his separate opinion below that nothing short of the opportunity for a hearing as outlined in *Goldberg v. Kelly*, 397 U.S. 254 (1970) would satisfy due process.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The extent to which procedural due process must be afforded is influenced by the extent to which the aggrieved person may be "condemned to suffer griev-

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[1]The current procedures are set forth in 20 C.F.R., Part 404, Subpart J. The regulations therein provide that a party to an initial determination who is aggrieved by the determination may take a first appeal by requesting reconsideration thereof. 20 C.F.R. §404.910. The aggrieved party may submit additional material for purposes of the reconsideration decision, but he is afforded no opportunity to present his case in person or present witnesses or cross-examine witnesses on behalf of the Secretary. Only after he has waited for a reconsideration determination may an adversely affected beneficiary finally request an evidentiary hearing before an impartial hearing examiner. 20 C.F.R. §§404.916, 404.917. If the individual is aggrieved by the decision of the hearing examiner he may request review of the decision by the Appeals Council. 20 C.F.R. §404.940. Only after a final decision of the Secretary has been issued under this three-step procedure may the individual obtain judicial review thereof by commencing a civil action in a United States District Court. 42 U.S.C. §405(g).

ous loss", *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The general principle is that governmental benefits may not be administratively terminated without a prior evidentiary hearing on contested issues of fact. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153 (1941). That principal is departed from only in emergency situations where, in light of the character of the interest infringed, the issue to be adjudicated, and the burden on the government of providing a hearing, the individual interest is outweighed by compelling government necessity.[2] The issue of when a hearing must be afforded is usually synonymous with the question of whether due process requires an opportunity to be heard. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). The opportunity must be to be heard "at a meaningful time and in a meaningful manner". *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Viewed in light of the due process standards outlined above,[3] The Social Security Administration's present decision-making and review procedure fails to pass constitutional muster. It has totally failed to protect the rights of

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[2]See, e.g., *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1951) (seizure of mislabeled vitamin product); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of food not fit for human use); *Yakus v. United States*, 321 U.S. 414 (1944) (adoption of wartime price regulations); *R.A. Holman & Co. v. SEC*, 299 F.2d 127 (D.C. Cir. 1962), cert. denied, 370 U.S. 911 (1962) (suspension of exemption from stock registration requirement); *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964) (disqualification of a contractor to do business with the Government).

[3]Amici will make no extensive analysis of the constitutional standards in this case. They can add nothing to the excellent legal argument made by the Legal Aid Society of Alameda County in its amicus curiae brief filed in this case.

needy Title II Retirement and Survivors Insurance beneficiaries whose payments have been suspended pursuant to section 204(a) of the Act, 42 U.S.C. §404(a), in order to recoup alleged overpayments. Answers to Interrogatories by Social Security Administration personnel on behalf of the Secretary in the pending cases of *Van Guilder, et al. v. Richardson* (D. Minn., Civil No. 4-70-386) and *Hopkins, et al. v. Richardson* (E.D. Pa., Civil No. 71-37) and affidavits of Social Security Administration personnel filed therein demonstrate the high percentage of error in making initial determinations and the long delays through which persons whose benefits are suspended or reduced must suffer while awaiting administrative review.

The process regarding section 204 begins with an initial determination by the Secretary that an individual has received an overpayment. This is an *ex parte* determination. If at that time the individual is still otherwise entitled to receive current and continuing monthly benefits, action is taken to withhold a sufficient amount of current and continuing monthly benefits to recoup the alleged overpayment. Concurrent with such recoupment action, the individual is informed of his right to request reconsideration of the initial determination of overpayment and/or waiver of recovery [pursuant to section 204(b) of the Act, 42 U.S.C. §404(b)] of the overpaid amount.[4] In 1970 the Secretary made 1,250,000 initial determinations that beneficiaries under the retirement, survivors and disability insurance programs had received overpayments[5] and took approximately

[4]Answer, dated September 8, 1971, by Hugh F. McKenna, Director, Bureau of Retirement and Survivors Insurance, Social Security Administration, to plaintiffs' Interrogatory number 86 in *Van Guilder v. Richardson, supra.* The Interrogatory and Answer are set forth in the Appendix to this brief. See Appendix A.

[5]Affidavit of Hugh F. McKenna, dated November 1, 1971, in *Van Guilder v. Richardson, supra.* See Appendix B.

350,000 actions suspending or reducing benefits in order to recoup the alleged overpayments.[6] In the 1,250,000 overpayment determinations in 1970 there were approximately 12,000 requests for reconsideration of such initial determinations. Approximately 8,250 of those initial determinations were reversed upon reconsideration by the Secretary.[7] The median time for a reconsideration determination in the Retirement and Survivors Insurance Programs to be rendered after receipt of a reconsideration request was ninety-four (94) days in 1969.[8] In the Disability Insurance program the reconsideration processing time in February 1971 was a median eighty-six (86) and a mean ninety-nine and eight tenths (99.8) days.[9]

The above figures demonstrate the extent of injury to individuals under present Social Security Administration review procedures. Less than one (1%) percent of those persons whom the Secretary initially determined to have been overpaid in 1970 requested reconsideration. However, for the persons who challenged the Secretary's decision by requesting reconsideration there was approximately a sixty-nine (69%) percent reversal rate, almost double the thirty-six (36%) percent reversal rate the lower court in *Gold-*

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[6]Answer, dated October 28, 1971, by James V. Matarazzo, Technical Advisor, Bureau of Retirement and Survivors Insurance, Social Security Administration, to plaintiffs' Interorgatory number 20(c) in *Hopkins v. Richardson, supra.* See Appendix C.

[7]Affidavit of Hugh F. McKenna, dated November 1, 1971, in *Van Guilder v. Richardson, supra.* See Appendix B.

[8]Answer, dated June 11, 1971, by Hugh F. McKenna, to plaintiffs' Interrogatory number 66(b) in *Van Guilder v. Richardson, supra.* See Appendix D.

[9]Answer, dated June 11, 1971, by Hugh F. McKenna, to plaintiff's Interrogatory number 66(c) in *Van Guilder v. Richardson, supra.* See Appendix D.

berg v. Kelly, supra, found to be "a startling statistic". *Kelly v. Wyman,* 294 F. Supp. 893, 901 (S.D.N.Y. 1968). Those persons were forced to wait, with a chief source of their income gone, for over three (3) months *after* requesting reconsideration, for the Secretary to correct his error.

Of the 3,750 cases in 1970 where the reconsideration affirmed the initial determination of overpayment, there were approximately 1,600 requests for hearings. After hearings there were an additional 560 reversals,[10] a thirty-five (35%) percent reversal rate. The median time for hearing decisions to be rendered after receipt by a hearing examiner of a request for hearing was ninety-six (96) days in 1969 in the retirement and survivors programs and ninety-seven (97) days in the disability program.[11] Thus the beneficiaries in those cases were forced to wait at least an additional three (3) months for hearings after receiving unfavorable reconsideration determinations. In the average case then, these persons were forced to wait at least six (6) months, through two steps of the review process for determinations to be made that their benefits had been wrongfully suspended. This assumes, of course, that such persons immediately requested reconsideration after receiving notice of the initial determination of overpayment and immediately requested a hearing after receiving notice of an unfavorable reconsideration determination. The problem to

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[10] Affidavit of Hugh F. McKenna, dated November 1, 1971, in *Van Guilder v. Richardson, supra.* See Appendix B.

[11] Answer, dated June 11, 1971, by Hugh F. McKenna, to plaintiffs' Interrogatory number 67(h) in *Van Guilder v. Richardson, supra.* See Appendix E. Other figures indicate that the "lag time" for hearing examiner decisions in the disability program was one hundred fourteen (114) days in calendar year 1969. Dixon, "The Social Security Disability Program: A System in Crisis," Report to the Committee on Grant and Benefit Programs of the Administrative Conference of the United States, page 38 (October 27, 1971).

which this Court alluded in *Goldberg, supra,* may also exist here:

> ". . . termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."
>
> *Goldberg v. Kelly, supra,* at 264.

The above figures outline only the performance of the Secretary's decision-making and review process on the substantive question of whether overpayments existed. It is also possible for a person initially determined to have been overpaid to request that the Secretary waive recovery of the overpayment pursuant to section 204(b) of the Act, 42 U. S.C. §404(b). In order to be eligible for waiver, the beneficiary must have been "without fault" in receiving the overpayment and recoupment would either be contrary to the purposes of Title II of the Act or be "against equity and good conscience". Out of the 350,000 recoupment actions taken by the Secretary in all programs in 1970 there were 18,520 requests for waiver. In 10,085 of those cases waiver of recovery of the alleged overpayment was granted.[12] Thus, fifty-four (54%) percent of these beneficiaries should not have suffered suspensions because they were entitled to waiver of recovery of the overpayment. Yet again,

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[12]Answers, dated July 21, 1971, by Robert P. Flynn, Acting Director, Bureau of Retirement and Survivors Insurance, Social Security Administration, to plaintiffs' Interrogatories 21(c) and 22(c) in *Hopkins v. Richardson, supra.* See Appendix F.

however, they were forced to wait long periods of time while seeking redress. The average time for an initial determination granting or denying waiver is an estimated eighty-five (85) days. An average of forty (40) days elapses from the date of an initial determination to undertake recoupment action to the date that the beneficiary requests waiver. An average of forty-five (45) days elapses between the date of a request for a waiver determination and the date such a determination is rendered.[13] Of the 8,435 requests for waiver that were initially denied in 1970, the Social Security Administration estimates that there were requests for reconsideration in five (5%) percent of the cases (422).[14] There was an additional twenty (20%) percent reversal rate of initial denials of waiver upon reconsideration (approximately eighty-three (83) cases).[15]

In defense of the review procedure outlined above and in support of the District Court decision in this case it might be argued that the existing procedures have served well to correct erroneous initial determinations by the Secretary and that something analogous to the reconsideration procedure might be instituted as a presuspension procedure in this case. The fact that the existing reconsideration procedure corrects many erroneous initial determinations provides little comfort to the persons who must make do without their benefits for an average of over three (3) months (if they act as promptly as possible) until a hear-

[13]Answer, dated October 28, 1971, by James V. Matarazzo, to plaintiffs' Interrogatory number 32 in *Hopkins v. Richardson, supra.* See Appendix G.

[14]Answer, dated October 28, 1971, by James V. Matarazzo, to plaintiffs' Interrogatory number 24 in *Hopkins v. Richardson, supra.* See Appendix H.

[15]Answer, dated October 28, 1971, by James V. Matarazzo, to plaintiffs' Interrogatory number 25 in *Hopkins v. Richardson, supra.* See Appendix I.

ing decision is rendered (where thirty-five (35%) percent of the Secretary's initial and reconsidered determinations are reversed favorably to the beneficiary).

The fact that Title II beneficiaries may have to go without their payments while awaiting an opportunity for a hearing is a crucial fact that this Court cannot ignore. As a practical matter, beneficiaries of Retirement, Survivors and Disability insurance benefits are just as dependent upon their benefits as were the welfare recipients in *Goldberg v. Kelly, supra.* OASDI beneficiaries are not dependant by *definition* upon benefit payments for their livelihood. However, just as this Court found that "A kind of 'need' is present in the statutory scheme for [unemployment] insurance . . . to the extent that any 'salary replacement' insurance fulfills a need caused by lost employment.", *California Dept. of Human Resources v. Java,* 402 U.S. 121 (1971), the District Court in this case found that "a disability beneficiary is by definition unable to engage in substantial gainful activity and he would, therefore, be liable to sustain grievous loss while awaiting the resolution of his claim." 321 F. Supp. at 386.

The same type of "need" that exists in the unemployment insurance and disability insurance programs exists in the retirement insurance program. The insurance benefits under that program act as a replacement for the income which the retired beneficiary no longer earns. "The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.", *Helvering v. Davis,* 301 U.S. 619, 641 (1937) (Cardozo, J.). The Social Security Administration has found that at the close of 1967 "Old-age, survivors, disability, and health

insurance (OASDHI), *as the basic income-maintainance program for the elderly in this country,* provided regular benefits to more than 5 million couples and 7.5 million nonmarried persons . . ." and that "[N]early half the couples and three-fifths of the nonmarried beneficiaries were practically without retirement income except for their [retirement insurance] benefit." Bixby, "Income of People Aged 65 and Older: Overview From 1968 Survey of the Aged", U.S. Dept. of H.E.W., Social Security Administration, Office of Research and Statistics, Report No. 1 (April 1970) page 3 (emphasis supplied). When the total income of this one-half to three-fifths of the aged is suspended or terminated, they are "driven to the wall" even more severely than the wage earner in *Sniadach v. Family Finance Corp., supra,* who in no event could be deprived of more than one-half of his income. 395 U.S. at 338, footnote 1.

Similarly, "need" exists for widows and orphans in the survivors insurance program to replace the income lost by the death of a breadwinner.[16] The Social Security Administration's 1963 National Survey of Widows with Children under OASDHI found that "OASDHI was the major source of income for almost two-thirds of the widowed families, and substantially improved the economic position of all of them", and that OASDHI survivors insurance benefits provided forty-six (46%) percent of the aggregate income for these beneficiary-family units in 1962. Palmore, Stanley, and Cormier, "Widows with Children under Social Security", U.S. Dept. of H.E.W., Social Security Administration,

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[16] "The general purpose of the old-age, survivor and disability insurance provisions of Title II of the Social Security Act is to protect workers and their dependents from the risk of loss of income due to the insured's old age, death or disability." *Delno v. Celebrezze,* 347 F.2d 159, 161 (9 Cir. 1965).

Office of Research and Statistics, Research Report No. 16 (1966) page 15. The same report found that widowed families who were beneficiaries of survivors insurance benefits had "at least one and one-half times the 1963 income of all female-headed families with a comparable number of children" and that "The most important single factor in the more favorable economic position of beneficiary families in comparison with all female-headed families was their income from survivor programs." Palmore, et al., *Ibid.*, page 31.

During the period of delay while seeking review of determinations terminating, suspending or reducing their benefits many beneficiaries must resort to welfare for their ordinary and necessary living expenses. Welfare conditions of eligibility are burdensome in most states—particularly for the aged.[17] Pennsylvania and Minnesota, for example, require applicants for Old Age Assistance to subject the homes they have worked all their lives to purchase to a lien for the amount of welfare paid to them.[18] Additionally Minnesota prohibits the payment of Old Age Assistance to any person if the net value of his property or the net value of the combined property of husband and wife exceeds ten thousand ($10,000) dollars.[19] Pennsylvania also requires suspended Social Security recipients to

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[17]There are lien requirements and "payback" requirements in 25 states. "Characteristics of State Public Assistance Plans Under the Social Security Act," U.S. Dept. of H.E.W., Public Assistance Report Number 50, 1970 Edition.

[18]Pennsylvania Support Law, Act of June 24, 1937, P.L. 2045, section 4, as amended, 62 Purdon's Stat. §1974; Pennsylvania Department of Public Welfare, Public Assistance Manual, Section 3820, et seq.; *Minnesota Statutes*, 1969, §256.26, subdivision 3; Minnesota Department of Public Welfare, Public Welfare Manual, section VII-2140, et seq.

[19]*Minnesota Statutes*, 1969, §256.18(2).

sue their sons and daughters for support before a welfare grant will be paid to them.[20]

It is entirely understandable, then, that many suspended Social Security recipients refuse to resort to welfare. Pennsylvania's Department of Public Welfare estimates that the Housing Lien alone deters over 100,000 otherwise eligible individuals from applying for welfare.[21] These recipients must somehow exist without the chief source of their income until the Social Security Administration gets around to correcting its error. This prospect also faces many who do not know that they are qualified to receive welfare, or are mistakenly told that they are ineligible when they apply.

If welfare recipients are accorded full hearing rights *before* their grants are adversely affected, it is very difficult to explain to a Social Security beneficiary—who relies just as heavily on his payment as does the welfare recipient on his grant, who has been compelled to pay the Social Security Payroll Tax for most, if not all his working life—that he does not have the same rights. Indeed, it is impossible to explain such a gross inequity. Inequities such as this no doubt contribute greatly to the "societal malaise that may flow from a widespread sense of unjustified frustration and insecurity." *Goldberg v. Kelly, supra,* at 265.

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[20]Pennsylvania Support Law, Act of June 24, 1937, P.L. 2045, section 3, as amended, 62 Purdon's Stat. §1973; Pennsylvania Department of Public Welfare, Public Assistance Manual, §§3234.6 and 3237.

[21]Staff Report, Governor's Housing Task Force, Commonwealth of Pennsylvania, "Better Housing: A Social Priority for Pennsylvania," page 49 (1969).

CONCLUSION

The amici submit that the vital need which in fact exists for Title II retirement, survivors and disability insurance benefits, the great number of erroneous initial and reconsidered determinations affecting the receipt of those benefits, and the long delays involved in seeking administrative review of erroneous decisions mandate that the due process standard which should be applied in this case and in all cases involving the suspension, reduction and termination of Title II benefits be that of the opportunity for a hearing prior to such suspension, termination or reduction. Cf., *Goldberg v. Kelly, supra.* For the foregoing reasons, it is the prayer of amici that the judgment of the Court below be reversed insofar as it fails to require the opportunity for such a hearing.

Dated, Minneapolis, Minnesota December 6, 1971.

Respectfully submitted,

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APPENDICES

APPENDIX A

Answer, dated September 8, 1971, by Hugh F. McKenna, Director, Bureau of Retirement and Survivors Insurance, Social Security Administration, to plaintiffs' Interrogatory number 86 in *Van Guilder v. Richardson, supra.*

Interrogatory #86

Does the Secretary make a request for voluntary repayment from overpaid persons in the retirement and survivors programs whenever he makes an initial determination that a person receiving such benefits has been overpaid?

Answer

No . . . If, at the time of the initial determination of overpayment, the individual is still otherwise entitled to receive current and continuing monthly benefits, action is taken to withhold a sufficient amount of current and continuing monthly benefits to recoup the outstanding overpayment. Concurrent with such recoupment action, the individual is informed of his right to request reconsideration of the initial determination of overpayment and/or waiver of recovery of the overpaid amount.

APPENDIX B

Affidavit of Hugh F. McKenna, dated November 1, 1971, in *Van Guilder v. Richardson, supra.*

I, Hugh F. McKenna, being duly sworn, depose and say as follows:

(1) I am the Director of the Bureau of Retire-

ment and Survivors Insurance of the Social Security Administration, and as such am responsible for the formulation of policies and procedures whereby retirement, dependent and survivors claims under Title II of the Social Security Act are adjudicated. As Director of the Bureau of Retirement and Survivors Insurance I am responsible also for the supervision of the Payment Centers of the Social Security Administration in their adjudication of Title II claims.

(2) In compliance with the court's order dated September 16, 1971, the Administration has developed estimates as follows:

(3) In 1970 the Social Security Administration made overpayments in approximately 1,250,000 cases.

(4) Of these 1,250,000 overpayments there were requests for reconsideration in approximately 12,000 cases.

(5) Of the 12,000 reconsideration determinations with respect to overpayments there were approximately 8,250 reversals and approximately 3,750 affirmances.

(6) Of the 3,750 reconsideration affirmances with respect to overpayments there were requests for hearing in approximately 1,600 cases.

(7) Of the 1,600 cases that went to hearing with respect to overpayments there were reversals in approximately 560 cases and affirmances in 1,040 cases.

APPENDIX C

Answer, dated October 28, 1971, by James V. Matarazzo, Technical Advisor, Bureau of Retirement and Survivors Insurance, Social Security Administration, to plaintiffs' Interrogatory number 20(c) in *Hopkins v. Richardson, supra.*

Interrogatory #20

How many OASDI recipients had their benefits terminated, suspended or reduced by the Social Security Administration in order to recoup past alleged overpayments made to them:

(a) . . .

(b) . . .

(c) During 1970?

Answer

350,000 (estimate).

APPENDIX D

Answer, dated June 11, 1971, by Hugh F. McKenna, to plaintiff's Interrogatory number 66(b) in *Van Guilder v. Richardson, supra.*

Interrogatory #66

During calendar year 1969 what was the average time which elapsed between the date of request for reconsideration of initial determination and date of reconsidered determination in cases involving initial determinations that individuals had received overpayment of:

(a) Old age insurance benefits.

Answer

See Interrogatory #66(b).

(b) Survivors insurance benefits.

Answer

Upon receipt of a request by a Retirement and Survivors Insurance Payment Center, the median time for additional evidentiary development to accord the claimant maximum consideration (usually evidence to be obtained directly from the claimant) is 74 days and the median time for a reconsideration determination to be rendered thereafter by the Social Security Administration is 20 days. These figures are with regard to elapsed times to process all issues on reconsideration, including reconsiderations of initial determinations of overpayments. Discrete data as to reconsiderations of determinations of overpayments solely is not compiled by the Social Security Administration.

(c) Disability insurance benefits.

Answer

Discrete data is not available. However, reconsideration processing time for *all* cases in February 1971 was a median 86 days; a mean 99.8 days. These figures would be representative of reconsideration elapsed times in 1969.

APPENDIX E

Answer, dated June 11, 1971, by Hugh F. McKenna, to plaintiffs' Interrogatory number 67(b) in *Van Guilder v. Richardson, supra.*

Interrogatory #67

During calendar year 1969 what was the average time which elapsed between the date of request for hearing and date of hearing decision in cases involving reconsidered determinations that individuals had received overpayments of:

(a) Old age insurance benefits.

Answer

See Interrogatory #67(b).

(b) Survivors insurance benefits.

Answer

Discrete data is not available. However, upon receipt of a request for a hearing by the hearing examiner, the median time for a decision to be rendered is 96 days. This figure includes hearings of all retirement and survivors insurance issues.

(c) Disability insurance benefits.

Answer

Discrete data is not available. However, the average length of time between requests for hearings and the decision thereon in all disability cases in calendar year 1969 was 97 median days.

APPENDIX F

Answer, dated July 21, 1971, by Robert P. Flynn, Acting Director, Bureau of Retirement and Survivors Insurance, Social Security Administration, to plaintiffs' Interrogatories 21(c) and 22(c) in *Hopkins v. Richardson, supra.*

Interrogatory #21

Of those OASDI recipients who had their benefits terminated, suspended or reduced by the Social Security Administration in order to recoup past alleged overpayments, how many requested that recoupment be waived under 42 U.S.C. §404(b):

(a) . . .

(b) . . .

(c) During 1970?

Answer

18,520.

Interrogatory #22

How many requests for waiver under 42 U.S.C. §404(b) were allowed:

(a) . . .

(b) . . .

(c) During 1970?

Answer

10,085.

APPENDIX G

Answer, dated October 28, 1971, by James V. Matarazzo, to plaintiffs' Interrogatory number 32 in *Hopkins v. Richardson, supra.*

Interrogatory #32

What is the current average number of days elapsed:

(a) From the time of an Initial Determination to terminate, suspend or reduce benefits to the time that a recipient requests waiver under 42 U.S.C. §404(b)?

Answer

40 days (estimate).

(b) From the time a recipient requests waiver under 42 U.S.C. §404(b) to the time when an Initial Determination either allowing or disallowing his request is made?

Answer

45 days (estimate).

APPENDIX H

Answer, dated October 28, 1971, by James V. Matarazzo, to plaintiffs' Interrogatory number 24 in *Hopkins v. Richardson, supra.*

Interrogatory #24

How many recipients, whose requests for waiver under 42 U.S.C. §404(b) were disallowed, requested Reconsideration of the Initial Determination to disallow their requests:

(a) During 1968?

(b) During 1969?

(c) During 1970?

(d) During the period January 1, 1971 to March 31, 1971?

Answer

Reference is made to paragraph 5c of the court's order to this Interrogatory. The Administration estimates that no more than 5 percent of the recipients, whose request for waiver were disallowed, petitioned for reconsideration of the initial determination disallowing such requests.

APPENDIX I

Answer, dated October 28, 1971, by James V. Matarazzo, to plaintiffs' Interrogatory number 25 in *Hopkins v. Richardson, supra.*

Interrogatory #25

How many disallowances of request for waiver under 42 U.S.C. §404(b) were reversed upon Reconsideration?

(a) During 1968?

(b) During 1969?

(c) During 1970?

(d) During the period January 1, 1971 to March 31, 1971?

Answer

Reference is made to paragraph 5c of the court's order for answer to this Interrogatory.

The Administration estimates that no more than 20 percent of the disallowance of requests for waiver were reversed upon reconsideration.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~161~~ 70-161

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare, *Appellant*,

v.

RADIE WRIGHT, ET AL., *Appellees*.

No. ~~5211~~ 70-5211

RADIE P. WRIGHT, ET AL., *Appellants*,

v.

ELLIOT L. RICHARDSON, Individually and in his Capacity as Secretary of Health, Education and Welfare, *Appellee*.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR NATIONAL COUNCIL OF SENIOR CITIZENS AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 161

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare, *Appellant*,

v.

RADIE WRIGHT, ET AL., *Appellees*.

No. 5211

RADIE P. WRIGHT, ET AL., *Appellants*,

v.

ELLIOT L. RICHARDSON, Individually and in his Capacity as Secretary of Health, Education and Welfare, *Appellee*.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR NATIONAL COUNCIL OF SENIOR CITIZENS AS AMICUS CURIAE

INTEREST OF THE AMICUS

The National Council of Senior Citizens is the major organization of the elderly in the United States. The combined membership of its affiliated clubs numbers some three million older Americans. Practically all its members are retired or disabled workers who have been covered by the provisions of the Social Security Act throughout their working lives. Future member-

ship likewise will come mainly from the ranks of workers, many of whom will experience administrative action (with which they will disagree) suspending, diminishing or terminating OASDI benefits.

The National Council has appeared before this Court this term as *amicus* in *Allied Chemical & Alkali Workers of America, Local 1* v. *Pittsburgh Plate Glass Company, Chemical Division, et al.*, 70-910 and *National Labor Relations Board* v. *Pittsburgh Plate Glass Company, Chemical Division, et al.*, 70-961.

Statistics show that the prevalence and severity of disability accelerate with age. Severe disability is approximately ten times as prevalent among older adults as among younger adults. The proportion of disabled is approximately twice as large among those aged 35-44 as among those aged 18-34; three times as large among those 45-54; and five times as large among those aged 55-64 (*Social Security Survey of the Disabled*, Report No. 3, July, 1968). Because of the devastating impact that the suspension or termination of benefits has on the elderly and disabled poor, the National Council of Senior Citizens has a vital interest in presenting its views to this Court.

All parties have consented to the filing of this *amicus* brief.

ARGUMENT

DUE PROCESS REQUIRES A HEARING BEFORE TERMINATION OF DISABILITY BENEFITS

The issue in this case is whether Social Security disability benefits can be terminated without a prior hearing. It has long been established that a person aggrieved by action of a governmental agency has a constitutional right to a trial-type hearing on issues

of adjudicative fact. *Londoner* v. *City & County of Denver*, 210 U.S. 373 (1908); *Garfield* v. *United States ex rel. Goldsby*, 211 U.S. 249 (1908). Disability Insurance payments are statutorily mandated for persons qualified to receive them. 42 U.S.C. § 401, *et seq.*

Constitutional restraints apply as much to the withdrawal of disability benefits as to the withdrawal of public assistance, *Goldberg* v. *Kelly*, 397 U.S. 254 (1969); or to the disqualification for unemployment compensation, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); or to the denial of a tax exemption, *Speiser* v. *Randall*, 357 U.S. 513 (1958); or to discharge from public employment, *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956).

The question of when a hearing must be held usually depends on the question of whether due process requires a hearing. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). A hearing is only meaningful if the affected individual is given fair opportunity to challenge the correctness of a decision before concrete damage has occurred. This is what is meant by "an opportunity [to be heard] at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1964). Notice and hearing necessarily must precede final administrative action predicated on the very harms sought to be avoided. *Opp Cotton Mills, Inc.*, v. *Administrator*, 312 U.S. 126, 152-53 (1941); *United States* v. *Illinois Cent. R.R.*, 291 U.S. 457, 463 (1934).

In cases where the government is the opposing party and in particular when there is a matter of change of government benefits, a hearing must be held before governmental action or deprivation of benefits. *Gon-*

salez v. *Freeman*, 334 F. 2d, 570 (D.C. Cir. 1964); *Morgan* v. *U.S.*, 304 U.S. 1 (1937); *Goldsmith* v. *U.S. Board of Tax Appeals*, 270 U.S. 117 (1926); *Garfield* v. *U.S.*, *supra*; *Londoner* v. *City and County of Denver*, *supra*.

The common and crucial factor in all of the above cases is the impact of the proposed administrative determination on the individual. Disability Insurance, like a retirement annuity, "is the mainstay of existence at the stage of life when one's ordinary work is no longer possible or available." *Garrott* v. *U.S.*, 340 F. 2d 615, 619 (Ct. Cl. 1965). A prior examination of the impact of termination of benefits on the beneficiary at an evidentiary hearing is therefore necessary.

1. Governmental Interests Served by Summary Termination Are Wholly Inadequate

The only possible governmental interests served by summary termination are avoiding the cost and administrative burden of pre-termination hearings. The clear intent of the Social Security Act is for the government to absorb the cost of mistakes, not the beneficiary. Administrative burden is a misnomer since a hearing is presently provided, but at a later point in time, and after the hardship brought on by discontinuance has set in.

The basic governmental interest at stake is the possible additional expense of prompt hearings and payments to ineligible beneficiaries. The protection against incorrect expenditure of public revenue is a legitimate concern. However, this concern does not justify summary termination. "The saving of welfare costs cannot justify an otherwise invidious classifica-

tion." *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). Any possible such cost saving here cannot be a ground for denial of due process rights.

The cost argument was advanced and rejected in public assistance cases. *Goldberg* v. *Kelly, supra*, at p. 266. There are nearly five times as many public assistance recipients as disability recipients. Social Security Bulletin, 52, 71, Tables M-23, Q-17 (September 1969). Yet, even the significantly larger number of public assistance recipients does not impose a sufficient cost burden to dispense with the necessity of a hearing prior to termination.[1]

A payment incorrectly made may be recovered by the Social Security Administration. 42 U.S.C. § 404; 20 C.F.R. § 404.501 *et seq.* Unlike the difficulty, if not impossibility, of recouping incorrect public assistance benefits from judgment-proof recipients, Disability Insurance beneficiaries are not judgment-proof. Recovery can be made by adjustment of any subsequent Social Security payments to the individual or to other individuals on the basis of the recipient's earnings or from the latter's estate. 20 C.F.R. § 404.502. Adjustment may be made if the individual "at any time thereafter becomes so entitled." 20 C.F.R. § 404.502(a).

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[1] The number of terminations will probably be very small. Rehabilitation prospects are markedly unfavorable for disability beneficiaries. Only 9,000 disability beneficiaries were rehabilitated in 1967. In 1966, 50 percent of all terminations were due to death; 35 percent were due to conversion to retirement benefits at age 65; only 14 percent were due to either medical recovery or return to work. This latter figure represented only 1.8 percent of all beneficiaries. (R. Treitel, Financing of Disability Beneficiary Rehabilitation, 32 Social Security Bulletin 29, 30-31 (April 1969).)

2. The Disability Beneficiary's Interest Outweighs the Government's Interest in Summary Termination of Benefits

a. The Disabled Beneficiary's Sole Means of Subsistence Are at Stake

Brutal need is as present here as it is in the situation where public assistance is incorrectly terminated without a prior hearing. *Goldberg* v. *Kelly, supra,* at p. 264. During the period between termination and subsequent reinstatement because of continued disability, the eligible individual by definition is unable to engage in gainful activity to avoid the hardship suffered by that incorrect termination.[2]

Disability Insurance payments "provide only a fraction of the income available from earnings . . . and they are in many cases, below minimum budgetary standards of adequacy." L. Haber, "Disability, Work and Income Maintenance: Prevalence of Disability, 1966," 31 Social Security Bulletin 14 (May 1968). "With the income of both the disabled man and his wife included, half of the disabled worker beneficiaries were below the near-poverty level . . . ." L. Haber, The Disabled Beneficiary—A Comparison of Factors Related to Benefit Entitlement, 21, Report No. 7, Social Security Survey of the Disabled: 1966 (June 1969). Of these, 34 percent were below the poverty level. *Id.,* at 18.

The median income (including income of all family members) of disabled worker beneficiaries was $2,836

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[2] Entitlement to disability depends upon an ". . . inability to engage in any substantial gainful activity because of any medically determinable . . . impairment . . . ." 20 C.F.R. § 404.1501(b) (1) (i). The impairment is one that must result from anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and diagnostic techniques. 20 C.F.R. § 404.1501(c).

in 1966. Unmarried male beneficiaries had a median income of $1,599. Unmarried female beneficiaries had a median income of $1,170. Married male beneficiaries had a median income of $3,469. H. Brehm, The Disabled on Public Assistance, Table 4, Report No. 9, Social Security Survey of the Disabled: 1966 (June 1970).[3]

In at least one important respect, a Disability Insurance beneficiary's plight is even more precarious than that of a recipient of public assistance. While both must concentrate upon finding the means for daily subsistence when their benefits are erroneously terminated, the Disability Insurance beneficiary additionally must acquire the means to purchase or otherwise obtain the medical evidence needed to counter the decision to terminate. The public assistance recipient need only rarely acquire costly medical evidence to re-establish entitlement.

Moreover, an incorrectly terminated Disability Insurance beneficiary is unable, by definition and in fact, to secure substantial gainful employment; a recipient of public assistance is oftentimes qualified for employment.

3. The High Degree of Error in Administrative Determinations Terminating Disability Benefits Indicates Need for Hearings Prior to Termination

In balancing the beneficiary's interest in avoiding the destitution, indignity, and brutal hardship of un-

[3] In contrast, the average family yearly payment under AFDC-UP in May, 1967 was $2,556 exclusive of allowed income. 5 Welfare in Review 27, Table 7 (October 1967). In December, 1965 the average yearly payments were $950 for OAA, $1104 for AB and $1044 for APTD exclusive of allowed income. Welfare in Review, 1966 Statistical Supplement, 7, Table 3 (1966).

warranted termination of Disability Insurance payments with the government's interest in summary termination, consideration should be given to the rate of incorrect terminations of Disability Insurance benefits. Statistics on such determinations show such a high rate of error and reversal that the necessity for a considered and impartial judgment before termination is manifest.

Of disability recipients who have been terminated by the Administration and have requested hearings (between fiscal 1967 and 1970), fully 53 percent have obtained reversals. Upon an adverse hearing determination, discretionary review is available before the Appeals Council. Between fiscal 1967 and 1970, the Appeals Council reversed 11 percent of reviewed cases. (Letter of Charles Erisman, Acting Director, Bureau of Hearings and Appeals, dated August 20, 1970.)

The administrative record in all Disability Insurance cases is also poor. In fiscal 1970, of all hearings held[4] 44 percent reversed the administrative action taken. For the entire disability program's history, reversals have resulted in 30 percent of the hearings. In fiscal 1970 the Appeals Council reversed 11 percent of all the adverse hearing decisions they reviewed. For the entire Disability Insurance Program's history the Appeals Council has reversed 9 percent of adverse hearings reviewed. In fiscal 1970, of all adverse determinations that were reviewed in the district court, 27 percent were reversed or remanded and subsequently reversed. For the entire Disability Insurance Program's history fully 35 percent of all cases reviewed

[4] Includes denials on initial application and termination.

by the district court resulted in reversals or remands with subsequent reversals. (Letter of Charles Erisman, *supra*.)

Furthermore, there is no time period within which a hearing decision must be rendered. After termination, a beneficiary must first request a reconsideration before a post-termination hearing may be requested. 20 C.F.R. §§ 404.909, 404.917. The median days for reconsideration cases from date of request to date of determination is 68 days. The median days from date of request for a hearing and a decision is 110 days. (Letter of Francis J. Cullen, Chief, Disability Statistics Branch, Social Security Administration, dated August 11, 1970.) The median elapsed time for hearing decisions is thus over 5 months.

Given this poor record and the duration of incorrectly terminated beneficiaries' suffering before a hearing decision, due process compels the uninterrupted receipt of benefits until after a hearing and determination.

4. The Complex Factual Issues in a Decision To Terminate Should Not Be Decided Ex Parte

In the Disability Insurance Program complex factual issues must be resolved. There are a myriad of issues which may arise and they are rarely, if ever, anticipated or understood by the individual beneficiary.

The complexity and difficulty of objectively ascertaining the facts responsible for a Disability Insurance termination is demonstrated by the 53 percent reversal rate of such terminations at subsequently requested hearings. It is precisely because the Disability Insur-

ance Program presents such complex factual issues that a beneficiary is entitled to a trial-type hearing.

There is a trial-type procedure for the determination of initial eligibility for Disability Insurance, which follows a rigorous well-defined set of apparently objective standards. Entitlement to disability depends upon an "... inability to engage in any substantial gainful activity because of any medically determinable . . . impairment . . ." 20 C.F.R. Sec. 404.1501(b)(1)(i). Elaborate evidentiary requirements are established through complicated procedures, including a trial-type administrative review and judicial review. 20 C.F.R. § 404.901 *et seq.* and 20 C.F.R. § 404.1501, *et seq.*

These elaborate and complicated procedures are calculated to weed out the frivolous and ineligible. Common notions of fairness compel the conclusion that what is so rigorously won may not be lightly taken away.

5. The Administrative Procedure Act Applies to Pre-suspension Hearings in Disability Cases

For the reasons stated above, a due process hearing is constitutionally required prior to the suspension of social security disability benefits. Because a hearing is required, the Administrative Procedure Act applies. The APA applies in "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C.A. § 554(a). None of the six exceptions to this statute are applicable.

It is well established that the applicability of the APA to hearings "required by statute" includes hear-

ings that are constitutionally mandated even though not explicitly required by statute. In *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950), this Court held that the APA applied to constitutionally required hearings, and said: "We think that the limitation to hearings 'required by statute' in § 5 [5 U.S.C. § 554(a)] of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion."

An adjudication is defined in the APA as an "agency process for the formulation of an order" (5 U.S.C. § 551(7)) and an order is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6).

A decision after hearing suspending disability benefits meets the requirement of finality, even though there are post-termination hearing procedures available. A final disposition is any disposition which directly affects a claimant's rights and has immediate financial impact on him. *A. E. Staley Mfg. Co.* v. *U. S.*, 310 F. Supp. 485 (D.Minn. 1970). In defining the analogous requirement of "final agency action" for purposes of judicial review under the APA (5 U.S.C.A. § 704), the courts have applied a pragmatic test which looks to the effect on the plaintiff, e.g., *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961), *Bucks County Cable TV, Inc.* v. *U. S.*, 299 F. Supp. 1325 (E.D. Pa. 1969).

The effect of suspending benefits to disabled individuals, like the appellants-appellees in this case, is obvious and irremediable, since no later recovery can recompense for the hardship of being deprived of the very means to live for a period of time. For this reason, a decision suspending benefits should be considered a "final" order for the purposes of 5 U.S.C. § 551(6) and the APA should apply.

Exemptions from the terms of the APA are not to be lightly presumed. The Act provides that a subsequent statute may not supersede or modify the APA "except to the extent that it does so expressly." 5 U.S.C. § 559. See also *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955).

The lower courts have ruled both ways on the application of the APA to disability claims hearings. Compare *Cappadora* v. *Celebrezze*, 356 F. 2d 1, 5 (2d Cir. 1966) (APA held applicable) and *Cohen* v. *Perales*, 412 F. 2d 44, 50 (5th Cir. 1969), *reh. den.* 416 F. 2d 1250 (5th Cir. 1969), *rev'd on other grounds*, *Richardson* v. *Perales*, 402 U.S. 389 (1971) (APA held not applicable). The reason given by the courts for holding the APA not applicable to disability benefit claims hearing is that the Social Security statute sets up a hearing procedure, so that under 5 U.S.C. § 556(b), the APA does not apply. *Cohen* v. *Perales, supra.*

This Court has ruled that it is not necessary to decide whether the APA applies, because the Social Security hearing procedure is substantially identical, *Richardson* v. *Perales, supra.* However, there is no statutory procedure for pre-suspension hearings and

no reason why the APA should not apply. Of course, because of the similarity of the existing Social Security hearing procedures to the APA, the administrative framework already exists for providing pre-suspension hearings meeting APA requirements.

The Appellants-Appellees Wright et al. and other *amici* have pointed out that the relief ordered by the District Court below will permit the Social Security Administration to adopt procedures in compliance therewith, which would fall short of minimal due process requirements. This Court held similar procedures unconstitutional in *Goldberg* v. *Kelly,* 397 U.S. 254 (1969). The constitutional arguments are persuasive for requiring procedures to guarantee the right to appear personally and present oral evidence, the right to confrontation and cross-examination, the right to retain counsel, and the right to a reasoned decision based solely on the legal rules and evidence adduced at the hearing. But these safeguards are also guaranteed by the APA which, for the reasons stated above, should apply.

CONCLUSION

For all of the foregoing reasons, the decision of the Court below should be reversed insofar as it held that the procedural requirements of due process for recipients of Social Security Disability Insurance benefits prior to suspension or termination of benefits, are satisfied with something less than the safeguards specified by this Court in *Goldberg* v. *Kelly,* 397 U.S. 254

(1969). In all other respects, the decision below should be affirmed.

DATED: December 10, 1971

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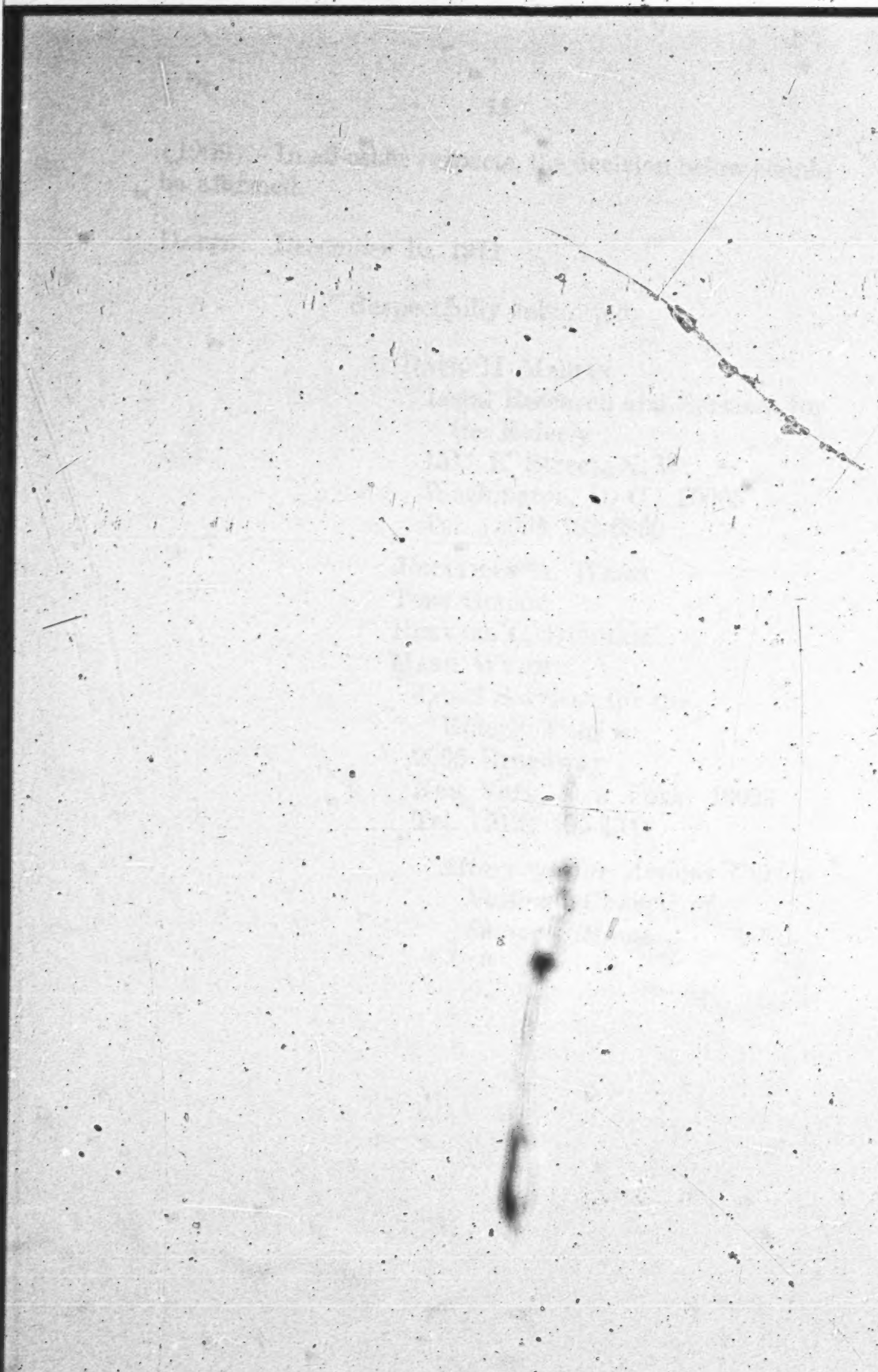

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IN THE

Supreme Court of the United States

October Term, 1971.

No. ~~71—1182.~~

RADIE P. WRIGHT, *et al.*,
Appellants,

vs.

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare,
Appellee.

No. 70—161.

ELLIOT RICHARDSON, Secretary of Health, Education and Welfare,
Appellant,

vs.

RADIE P. WRIGHT, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Brief *Amicus Curiae* on Behalf of Luella H. Mills, and all other persons similarly situated.

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IN THE

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October Term, 1971.

No. 71-1152.

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vs.

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Appellee.

No. 70-161.

ELLIOTT RICHARDSON, Secretary of Health, Education and Welfare,

Appellant,

vs.

RADIE P. WRIGHT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Brief *Amicus Curiae* on Behalf of Luella H. Mills, and all other persons similarly situated.

Interest of *Amicus Curiae.*

In April, 1971, Cornell Legal Aid filed the case of *Mills, et al., v. Richardson* (71 Civ. 208), as a class action in the United States District Court for the Northern

District of New York seeking to restrain the enforcement, operation and execution of Section 204 of the Social Security Act, 42 U. S. C. §404 on the ground of its repugnance to the Due Process Clause of the Fifth Amendment to the Constitution. This section authorizes the suspension of future Old Age, Survivors and Disability Insurance (hereinafter "OASDI") benefits provided for in Title II of the Social Security Act, 42 U. S. C. §401 *et seq.*, to recoup overpayments, although where the recipient is without fault, and recovery would defeat the purposes of the Act or be against equity and good conscience, recovery shall be waived.

The *Mills* case and *Wright v. Richardson* both raise fundamental questions of procedural due process relating to the suspension *(Mills)* or termination *(Wright)* of Social Security payments. Although different provisions of the Social Security Act are called into question by the two cases, a decision as to the requirements of due process on termination of disability benefits will control the outcome of the *Mills'* litigation.

The interest of amicus is best exemplified by a brief recital of the compelling and undisputed circumstances involved in the *Mills* case. Since 1964, a sixty-year-old widow (Luella Mills), nearly blind and partially crippled, had been receiving disability benefits for herself and survivor's insurance for both herself and her daughter, Gloria. These Social Security payments, amounting to one hundred and twenty-nine dollars per month, were the Mills' only means of subsistence.

In 1969, Gloria became ineligible to receive survivor's benefits. Mrs. Mills was not made aware of this fact, and due to the admitted error of the Social Security Administration's New York Payment Center, continued to receive her regular monthly checks. Almost two years later, on February 11, 1971, Mrs. Mills was notified by

mail that an overpayment had occurred and that all of her benefits were suspended until April, 1973, for the purpose of recoupment. No mention was made in this form letter of the requisite determination as to "fault," "the purposes of the Act," or "equity and good conscience," nor of any grounds on which such findings might have been based. Thus, in a most impersonal way, with wholly insufficient notice, the Social Security Administration deprived Mrs. Mills of the very means by which she lived, without so much as affording her the opportunity to contest the findings on which that deprivation must rest.

Whether Title II benefits are terminated on the ground of ineligibility or suspended on the ground of overpayment, bears little relevance to the caliber of the injury sustained or the necessity for due process safeguards. It is the position of amicus that cessation on either ground in the absence of adequate notice and a judicially-styled hearing is a deprivation of property without due process of law.

Summary of Argument.

All categories of benefits provided for in Title II of the Social Security Act are "property" within the context of the Fifth Amendment, and their deprivation must therefore comply with the requirements of procedural due process. The nature of the issues to be resolved, and the fundamental character of the interests involved, demand the protections of a judicially styled hearing. The specific grounds upon which the cessation of benefits is based does not alter the necessity for an adjudicatory proceeding.

ARGUMENT.

I.

Old age, survivors, and disability benefits are property interests and their deprivation must accord with the requirements of procedural due process of law.

The Court should squarely hold that once eligibility has been initially determined, all forms of Title II benefits are "property" as that term has come to be understood in the context of the Fifth Amendment, and may not be terminated or suspended without adequate notice and hearing. Indeed, such a holding is compelled by the recent decisions of this Court. In the case of *Goldberg v. Kelly*, 397 U. S. 254, 262 (1970), dealing with public assistance under Title IV of the Act, Justice Brennen, writing for the majority, noted that:

> "It may be realistic today to regard welfare entitlements as more like 'property' than as a gratuity. Much of the existing wealth in this country takes the form of rights which do not fall within traditional common law concepts of property. It has been aptly noted that 'Society today is built around entitlement . . . . Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space and education; *Social Security Pensions for individuals.*" (Italics supplied.) *Goldberg v. Kelly*, 397 U. S. 254, 262 (1970) n. 8, citing Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245, 1255 (1965). See, also, Reich, The New Property, 73 Yale L. J. 733 (1964).

Thus, in *Goldberg*, welfare benefits were recognized as a matter of statutory entitlement for persons qualified

to receive them, and procedural due process was held applicable to their termination.

Goldberg, although highly significant, is but one example of the line of cases holding that relevant constitutional restraints apply to the deprivation of many forms of property interests. Such deprivations now include the impairment of reputation by public notice, *Wisconsin v. Constantineau,* 400 U. S. 433 (1971); garnishment of wages, *Sniadach v. Family Finance Corp.,* 395 U. S. 337 (1969); disqualification for unemployment compensation, *Sherbert v. Verner,* 374 U. S. 398 (1963). Cf. *California Dept. of Human Resources v. Java, et al.,* 402 U. S. 121 (1970); denial of a tax exemption, *Speiser v. Randall,* 357 U. S. 513 (1958); discharge from public employment, *Slochower v. Board of Higher Education,* 350 U. S. 551 (1956); and termination of tenancy in public housing, *Escalera v. New York City Housing Authority,* 425 F. 2d 853 (2nd Cir. 1970), cert. denied 400 U. S. 853 (1971).

The Court's most recent recognition of the broad scope of due process protection is found in *Bell v. Burson,* 402 U. S. 535 (1971), which held that the suspension of a driver's license involves a sufficiently important interest to require notice and a prior hearing. The Court there stated:

> This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege." (Citing cases.) * * * it is fundamental that except in emergency situations, due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case *before* the termination becomes effective" (court's italics) (citing cases).

The principle that there must be notice and hearing prior to governmental action adversely affecting important interests to which one has been previously found legally entitled is simply a reassertion of a constitutional requirement settled by this Court more than sixty years ago. In *Garfield v. Goldsby*, 211 U. S. 249, 262 (1908), a unanimous Court stated there is

> "no place in our constitutional system for the exercise of arbitrary power. • • • The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded, is the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court. *Accord, Ex parte Robinson*, 86 U. S. 505, 513 (1873): 'The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged.'"

In view of these decisive precedents, it is inconceivable that Social Security benefits can be terminated or suspended without prior proceedings in which the recipient may participate. There is simply no justification for denying this protection to the recipients of all categories of Title II benefits who have spent their productive years contributing to the Social Security Payroll Tax with the expectation that when the time came they could rely on the receipt of those benefits to shield them "from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering v. Davis*, 301 U. S. 619, 641 (1936).

II.

In that the interests of recipients of Title II benefits are fundamental, due process requires that termination or suspension, on whatever grounds, be preceded by a judicially styled hearing.

A principle issue before this Court is the content of the due process protection to be afforded a recipient of Disability Insurance before benefits may be terminated on eligibility grounds. It has been persuasively argued that given the complex nature of disability determinations, only an adjudicative process can satisfy the requirements of the Fifth Amendment. Amicus fully agrees with this position, and believes it is supported by the inescapable reading of numerous decisions of this Court. Where "governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated wth the judicial process." *Hannah v. Larche*, 363 U. S. 420, 442 (1960); *Southern Railway Co. v. Virginia*, 290 U. S. 190, 199 (1933); *Philadelphia Co. v. S. E. C.*, 175 F. 2d 808, 817 (D. C. Cir. 1948). In the *Philadelphia Co.* case, the Court provided a concise summary of the protective norms which are constitutionally required herein (175 F. 2d at 817):

> "It is elementary also in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment of the Constitution."

Similar protections must be afforded to *all* withdrawals of Title II benefits and amicus urges the Court not to limit its holding so as to require judicially styled hearings only in disability determinations. That narrow holding would create an artificial and arbitrary distinction between terminations based on eligibility and suspensions based on overpayments. The policies which underlie the necessity of a judicially styled hearing in disability cases apply with equal if not greater force to cases in which benefits are suspended to recoup alleged overpayment. The conclusion compelled by the facts herein is that no benefits under Title II of the Social Security Act may be deprived without a judicially styled hearing in compliance with procedural due process.

As the Court said in *Cafeteria and Restaurant Workers Union, etc., v. McElroy,* 367 U. S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah v. Larche,* 363 U. S. 420, 440 (1960). In determining the contents of due process, the nature of the issues to be determined, the remoteness or immediacy of the citizen's interest, its quality and quantity, are all elements which are properly accounted in striking a balance between economy and convenience to the state, on one hand, and the injury, inconvenience and debasement of the individual citizen on the other.

In striking such a balance, it is important to note that the controverted issues which will arise in a recoupment case are of the kind traditionally subject to the judicial process. Questions of fault, the policies of the Social Security Act, and equity and good conscience may each be relevant in a decision to recoup an overpayment. Thus, administrative action in suspending benefits for recoup-

ment is plainly adjudicatory, involving issues not only of statutory construction and fundamental fairness, but also assessments as to the honesty and credibility of individual recipients, a determination on which this Court has particularly stressed the right to be heard. *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117 (1925); *Willner v. Committee on Character and Fitness*, 373 U. S. 96 (1963).

The property interest of the recipent in Social Security benefits is substantial. Attempts by the government to distinguish the importance of OASDI benefits from other interests protected by the requirements of notice and hearing are unavailing. Mr. Justice Douglas, concurring in *California Department of Human Resources v. Java, et al.*, 402 U. S. 121, 135 (1970), rejected as "surprisingly disingenuous" a similar attempt to distinguish welfare and unemployment benefits on the ground that one is based on need while the other is not. The argument that a recipient of Social Security benefits is not *per se* impoverished and hence not faced with "brutal need" is flatly incorrect in many factual situations (e. g., Mrs. Mill), and, in any event, totally overlooks the clear holding of *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969). It was there recognized that wages could not be garnisheed in the absence of a prior adjudication. As a general proposition wage earners are certainly no more destitute than widows, orphans, or the disabled.

Another significant aspect of the recipient's interest to be weighed in this due process balance is the potential debasement of human dignity often suffered when OASDI benefits are withdrawn. Such action may well result in a loss of both pride and self-esteem for persons who have worked and provided for their own needs throughout their lives. When eligible recipients of Social Security are denied those benefits in a summary manner, and often forced onto the welfare rolls, they face the degrad-

ing prospects of having their homes encumbered, their relatives compelled to provide support, and their tranquility disrupted. As the Court stated in *Wisconsin v. Constantineau*, 400 U. S. 433, 437 (1971), "where a person's good name, reputation, honor, or integrity is at stake, because of what the government is doing to him, notice and an opportunity to be heard are essential."

There are no interests at stake in the Social Security context which were not at stake in *Goldberg*, where the Court stated: "While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. • • • [T]he interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens."

Conclusion.

For the foregoing reasons, amicus urges this Court to hold that no benefits under Title II of the Social Security Act may, regardless of grounds, be deprived without adequate notice and a judicially styled hearing in compliance with procedural due process.

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No. 70-5211

RADIE WRIGHT, *et al.*, *Appellants*,

v.

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare, *Appellee*.

No. 70-161

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare, *Appellant*,

v.

RADIE WRIGHT, *et al.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS AND CROSS APPELLEES RADIE WRIGHT, *et al.*

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After defending existing procedures for suspension and termination of disability payments throughout this case, the Government now concedes that these procedures are unconstitutional. Abandoning its earlier contention that any recipient "participation in the determination proceedings" would disrupt the adjudicative process (Juris. St. 11), the Government now recognizes that a recipient must be "afforded a fair opportunity of correcting or contradicting anything prejudicial to his view before decision is reached" (Gov't Br. 24), and it promises that the Secretary, "in order

to afford reasonable notice and opportunity to participate in the determination proceedings, will adopt a procedure whereby the individual will be informed of the proposed adverse action and the information upon which it is based and will be given the opportunity to respond in writing before adverse action, if any, is taken." (Gov't Br. 22.)[1]

The Government continues to resist the requirement, imposed by the court below, that resolution of conflicting evidence be made by an impartial decision maker, and it also would decline to provide, even in the face of conflicting evidence of the recipient's continued disability, an opportunity for a preliminary oral hearing satisfying the "rudimentary" and "minimal" requirements prescribed in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and the other cases we have cited.[2] The Government's position is that the requirement of an opportunity "to be heard," the "fundamental requisite" of due process, can be satisfied by a so-called

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[1]The Government's decision to afford some procedural rights at some point in the future does not obviate the need for a ruling on the constitutional rights of recipients. So far, the Secretary has not even announced proposed procedures, and there is no way to know the kind of notice to be afforded, how long the recipient would have to file a response, and what data the recipient would be entitled to review. The court below said that the recipient should be given an opportunity to examine all of the documentary evidence supporting the proposed cessation. The Government now merely proposes that the recipient "be informed of . . . the information upon which [the adverse action] is based," which may contemplate supplying only summaries of the adverse information rather than providing an opportunity to examine that information. This Court should hold that disability suspensions or terminations be preceded by: (1) reasonable notice, (2) ample time for the recipient to file his response prior to cessation, and (3) an opportunity for the recipient to examine all adverse documentary evidence in his file.

[2]The Government reads the decision of the lower court to *require* an opportunity for an oral hearing. We have indicated that the decision may be construed as leaving the matter discretionary, and we urge the Court, should it be disposed to affirm the decision below, to make clear that an opportunity for an oral hearing is mandatory.

"hearing on paper."[3] (Gov't Br. 23, 24.) No authority is cited for this novel proposition. It rests entirely on the assertion that "a 'fair opportunity' can be afforded through written submissions." (Gov't Br. 24.) We submit that this position cannot be sustained in the face of the applicable case authority and the nature of disability determinations.

I. THE PROCEDURES PROPOSED BY THE GOVERNMENT DO NOT SATISFY RUDIMENTARY DUE PROCESS OR EQUAL PROTECTION GUARANTEES.

The Government concedes that "in many situations the right to a hearing comprehends an oral presentation at which the party may present evidence and confront and cross-examine witnesses." (Gov't Br. 23, 24.) It claims that this is not one of those "many situations" and concludes that disability recipients are not entitled to an opportunity to appear personally and present evidence, confront and cross-examine adverse witnesses, retain counsel, and a decision by an impartial person, based on the record, with an adequate explanation of its basis.

The asserted justification for this mere "hearing on paper" is that "social security disability payments are suspended only on the basis of an objective consideration—that the previous disability has ceased—and that conclusion rests on reliable information." (Gov't Br. 26.) The Government then claims that disability determinations are different from determinations made in *one* other context in which prior hearings have been required—welfare terminations—because welfare terminations "may" rest on "credibility and veracity" whereas this is not necessarily so in the disability context. (Gov't Br. 25, 26.)

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[3] The concept of a "hearing on paper" is contradictory on its face. As Professor Davis has written, no matter how narrowly it is defined, a hearing means "any *oral* proceeding before a tribunal." (Emphasis added.) Davis, *Administrative Law*, § 7.01, at 407.

The most serious defects in the Government's argument are:

1. The claim for "objectivity" and "reliability" of the evidence utilized in cessation of benefits has nothing whatsoever to do with determinations to *suspend* payments as distinguished from determinations to terminate. A decision to suspend means *only* that an inquiry has begun, and it means further that the Secretary has *not* determined that he has sufficiently objective or reliable evidence to justify a termination—a termination can be mandated only "after a more thorough investigation to verify the individual's disability status." (Gov't Br. 3.) Whatever force there may be to the Government's argument about "reliability" and "objectivity" of cessation determinations, it cannot justify summary suspension actions. At least in these cases—where by definition the Government can have no claim of objective proof of cessation of disability—a hearing is constitutionally mandated prior to cessation of payments.

2. It is not true that documents generally utilized to support suspension or termination, *i.e.*, doctors' or employers' reports,[4] constitute objective and unassailable proof that disability has ceased.[5] The text of the statute, its legisla-

[4] These are not the only bases on which suspensions or terminations may occur. As the Government points out, a cessation can occur where the Department determines that "the beneficiary refuses to cooperate"—by any construction a highly subjective judgment (Gov't Br. 15). This was the ground on which welfare benefits had been terminated in the *Goldberg* case and with respect to which pre-termination oral hearings were mandated. Goldberg v. Kelly, *supra* at 255 n. 2.

[5] The Government places principal reliance upon Richardson v. Perales, 402 U.S. 389 (1971), in support of its argument as to the objectivity and reliability of physicians' reports. But, as we have indicated (at page 38 of our main brief), that case does not say that a hearing is unnecessary in the face of a doctor's report. On the contrary, that case affirms the necessity for oral hearings and the right of disability recipients to subpoena doctors and otherwise to make a case at an oral hearing. In fact, even though a full hearing had been held in that case, this Court did not affirm the agency's decision that doctors' reports constituted "substantial evidence" that there was no

tive history, the applicable regulations and internal manuals—which emphasize the subjectivity and complexity of disability determinations and the need to make disability determinations on the basis of all the facts of each case without resort to easy litmus tests for determining whether disability has or has not ceased—and the extremely high reversal rates in post-termination hearings belie the claim of the invincibility of this "objective" evidence.[6] Thus, to the extent that employers' or doctors' reports are "objective" or "reliable," that merely makes them factors to be considered in a continuing disability determination—not conclusive judgments that preclude the recipient from probing their basis or presenting his own affirmative evidence on continuing disability.

3. No authority supports the Government's position that a conceded right to a prior hearing can be satisfied by a "hearing on paper" in the face of disputed facts. The cases cited arising under the Selective Service Act (*United States v. Nugent*, 346 U.S. 1 (1953); *Gonzales v. United States*, 348 U.S. 407 (1955); *Simmons v. United States*, 348 U.S. 397 (1955)) do not remotely suggest that a hearing requirement can be satisfied by a "hearing on paper."[7] These

disability; the Court held only that medical reports *could be* substantial evidence and remanded to the District Court to weigh the evidence in light of that holding. *Perales*, *supra* at 410. *See* Note, *The Supreme Court 1970 Term*, 85 Harv. L. Rev. 40, at 330-31 n. 31.

[6]It appears from statistics recited in the Government's brief that hearing reversals of disability determinations are now even higher than we have recited and that, during fiscal 1971, well over one-half of the disability cessation cases, which have proceeded through a hearing, have been reversed. (App. B.)

[7]The cases had to do with the rights of a draft registrant, claiming conscientious objector status, to review during various stages of an elaborate appeal machinery "secret" FBI reports, a resume of the evidence contained in those reports, and an "advisory" Department of Justice recommendation to an Appeal Board following an "auxiliary" hearing at the Department. The Court held that a registrant was entitled to production of the latter two, but not the former, striking a balance between the registrant's interests and the "demands of an effective system for mobilizing the Nation's manpower in times of

three cases confirm the necessity for an oral hearing prior to definitive action.[8]

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crisis." *Simmons*, *supra* at 403. The Court justified withholding the "secret" FBI reports on the ground that other safeguards in the procedure, including the right to an oral hearing at both the draft board and various appellate levels, "maintained the basic elements of fair play." *Id.* As the Court said in United States v. Nugent, *supra* at 6, 7: "no sham substitute will meet [a hearing] requirement . . . . We think the Department of Justice satisfies its duties [to provide a hearing on appeal] when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair resume of any adverse evidence . . . ." Moreover, Congress has now guaranteed a "fair hearing" to selective service registrants asserting a claim before a local or appeal board and has provided that even in this area where "informal and expeditious processing . . . [is] required," a "fair hearing" *requires* at least that a registrant have (1) an opportunity to make a personal appearance, (2) a right to present witnesses, and (3) a right to a written statement of the reasons for an adverse decision. Military Selective Service Act of 1967, 1971 Amendments Pub. L. No. 92-129, § 101 (36)(a), (b), 85 Stat. 353 (Sept. 28, 1971).

[8]Other cases cited by the Government are also contrary to its position. Hannah v. Larche, 363 U.S. 420 (1960), Armstrong v. Manzo, 380 U.S. 545 (1965), Grannis v. Ordean, 234 U.S. 385 (1914), and Greene v. McElroy, 360 U.S. 474 (1959), affirm that "the fundamental requisite of due process is the opportunity to be heard" (*Grannis*, at 394) "in a meaningful manner" (*Armstrong*, at 552); that agencies must "use the procedures which have traditionally been associated with the judicial process" in making binding adjudicative decisions (*Hannah*, at 442); and that opportunity for confrontation and cross-examination of adverse witnesses is a "vital feature" of the law, the "formalized" embodiment of due process (*Greene*, at 496, 497). The only other case cited in the Government's substantive argument, Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), is one where basic due process constraints were held inapplicable because the Government was operating in its proprietary capacity. The case has nothing to do with this case where the Government concedes that due process protections must be afforded and makes no claim that the Government acts in a proprietary role in cutting off welfare payments.

4. The Government cannot distinguish *Goldberg v. Kelly*. It seeks to differentiate that case on the ground that welfare terminations "may" result from "tips, rumor or gossip," thereby raising "credibility or veracity issues" which allegedly "will not be in issue" in disability cases. (Gov't Br. 25, 26.) There are serious flaws in this analysis.

(a) *Goldberg* does *not* say that an oral hearing is required only where informant credibility issues are raised. The principle established in *Goldberg* is that the constitutional requirement of a "meaningful hearing" cannot be satisfied by written submissions but requires:

> "that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, *where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.*" (At 267-268. Emphasis added.)

These principles squarely apply to disability cases. The Court in *Goldberg* expressly declined to confine its ruling to cases presenting tipster or other credibility issues (at 269). In fact, the only named plaintiffs described by the Court raised factual issues which did not present this type of credibility issue (one was terminated for failure to cooperate with the Welfare Department and the other for alleged failure to accept counseling), *Goldberg, supra* at 256 n. 2. Moreover, the oral hearings mandated in *Goldberg* cover welfare disability determinations raising the precise issues which would be raised in social security disability cases (*see* App'ts Br. 35).

(b) Cases decided by this Court in other contexts have not confined the requirement of a prior oral hearing to situations presenting only tipster or other forms of credibility issues. *See, e.g., Londoner v. Denver*, 210 U.S. 373 (1908),

Wisconsin v. Constantineau, 400 U.S. 433 (1971), *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Bell v. Burson*, 402 U.S. 535 (1971), and many of the other cases we cited in our main brief at pages 17-21 and 42-46.

(c) The argument as to the special necessity for cross-examination only where credibility issues are presented focuses entirely on only one aspect of the protections afforded by an oral hearing. Even if valid, the argument would not justify withholding the rights to appear personally, a determination by an impartial decision maker, and a written decision based on the facts and rules adduced at the hearing. These protections are especially important in a disability case[9] where, for example, personal appearance by the recipient gives him an opportunity to demonstrate in person his impairment, testify to the difficulties caused thereby, and answer specific inquiries by the decision maker.

(d) In any event, there *are* credibility issues in disability cases. As stated in a recent note in the Harvard Law Review, upon which the Government places substantial reliance:

> "Even apparently objective [medical] reports may involve threshold evaluations of credibility and may be based partially on the attitude of the doctor toward disability claimants. [Citations omitted.]" Note, *supra* at 330 n. 31.

Moreover, there may be "credibility" issues with respect to the thoroughness of the doctor's examination[10] or the ability of an employer properly to evaluate the recipient's work performance and any possible impact of this disability on

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[9] This is particularly so if, as the Government contends, some elevated status is necessarily afforded to employers' or doctors' reports. It appears from the high reversal rate that the only effective way to overcome these reports may be a personal appearance and a requirement of a written decision based on the evidence adduced at a hearing.

[10] That factor was very much in issue in the case of plaintiff John Atkins (A. 80).

that performance.[11] And since the *recipient's* credibility is squarely at issue in virtually any disability determination, his prospects for convincing the decision maker of the truthfulness of his claim may well be materially enhanced if the recipient has an opportunity to make an oral presentation.

II. GOVERNMENT CLAIMS OF COST OR BURDEN CANNOT JUSTIFY FAILURE TO AFFORD BASIC CONSTITUTIONAL PROTECTIONS.

This Court has repeatedly stated that although constitutional protections rarely can be afforded without some cost or administrative inconvenience, that fact cannot justify the withholding of basic constitutional rights. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *Goldberg v. Kelly, supra; Bell v. Burson, supra.* The Government does not dispute that proposition, but nonetheless undertakes a showing of the cost and burden which allegedly would flow from a hearing requirement. Although we do not believe that any such claim can defeat this constitutional requirement, we briefly summarize below the flaws in the Government's position.

The Government claims that providing an impartial decision maker or an opportunity for a preliminary hearing would require a "massive restructuring of the existing administrative adjudicative process" (Gov't Br. 27) because the Administration's district offices are not staffed with persons "qualified to make" disability determinations so that either State agency or central-office federal officials would have to decide[12] and/or hear proposed cessation cases (Gov't Br.

[11] The Government cites to an internal "Claims Manual" which says that benefits should not be terminated "solely" on the basis of a report from an informant (Gov't Br. 26). This suggests that informants' reports may be utilized in disability cases and provides little comfort to recipients since it says only that some scintilla of other evidence should be available prior to suspension—it by no means precludes substantial reliance on tipsters.

[12] The "massive restructuring" argument has nothing to do with the requirement, imposed by the court below, that cessations at least be decided by impartial decision makers. We do not understand the Government to contend that any restructuring would be required to provide this protection.

29). We fail to see what substantial burden would be caused if State agency offices (several of which already have multiple offices scattered throughout the state) process these cases or, in the alternative, if existing hearing examiner machinery is invoked to conduct pre-cessation hearings. Examiners now preside over the post-termination cases, always at a location near the recipient's home, and they could process the preliminary hearings without any organizational overhaul—simply by changing the timing of the present hearing. The Government's failure to mention the latter possibility in its argument here or below seems inexplicable, especially in light of the manner in which *Goldberg* has been implemented.[13] Moreover, even if some "restructuring" would be necessary to provide opportunity for a pre-cessation hearing, it can hardly be said that this would be a crushing blow to the fair and effective operation of the program. In fact, a recent elaborate report to the Administrative Conference of the United States on the disability program concludes that just this sort of restructuring should be undertaken. Dixon, *The Social Security Disability Program: A System in Crisis* (Oct. 27, 1971).[14]

* * * * *

[13] By regulation the Secretary has required states to integrate the due process requirements enunciated in *Goldberg* into the statutorily required post-termination hearing conducted by state hearing examiners. 45 C.F.R. §205.10, 36 Fed. Reg. 3035-3036 (1971)—notwithstanding the fact that *Goldberg* would have been satisfied by hearings conducted by officials in *local* welfare offices. The same logic would point toward use of existing hearing examiners to hear disability cases.

[14] The report recommends decentralization of either the State agency personnel or BDI staff for purposes of making determinations of disability. This is because, under present procedures, recipients have no face-to-face contact with decision makers either at the initial determination or reconsideration levels. It is only at a post-termination hearing that a recipient ever confronts a decision-maker. "Lack of such [face-to-face] contact is thought to be one inducement for appeal to the hearing examiner level, and the hearing examiner's personal contact is thought to be an element in the high reversal rate." At 132-133.

The Government argued in the lower court that the cost of delaying disability cessations pending a hearing would be in the range of $40 to $50 million (A. 34). This claim was sharply challenged by plaintiffs, and the lower court held that "whatever their magnitude" additional expenses "are insufficient justification considering the crippling blow that could be dealt to an individual in these circumstances" (A. 99). The Government has revised its computations and now says that a preliminary hearing requirement would cost some $16 million.

We do not deny the possibility of some additional costs arising from continued payments to persons who request a preliminary hearing, pending the completion of that hearing. It is clear, however, that the Government's $16 million cost estimate[15] is greatly inflated because it rests on a series of incorrect assumptions:

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[15] The Government also undertakes a floodgates argument to the effect that a vast number of cessations in other Title II programs would be affected by requirements imposed in the disability area and that the ultimate cost would exceed even the $16 million figure. The Government's analysis is unsound. First, this is a class action entirely on behalf of disability recipients, and the relief sought is necessarily confined to disability payments. The principles on which we rely may, of course, dictate that the protections sought be carried over to some cessations of payments under other Title II programs—but only in those instances where substantial and disputed fact issues exist. The Government concedes that the vast majority of Title II cessations would not raise such issues but it contends that some 515,000 Title II cases would be affected annually—over ten times as many as in the disability area. This is difficult to credit since hearing examiners presently spend 85% of their time hearing disability cases even though other Title II programs dwarf the disability program both in number of recipients and cessations. Dixon, *supra* at 36. Moreover, the Government includes in the 515,000 cases some 223,000 terminations where a child drops out of school, 106,000 terminations resulting from marriage, remarriage or divorce of a beneficiary, or death, or adoption of a child; and all disability terminations, including a large number of dependents' disability cessations where the essential determination centers around the status of the disabled wage earner, not the dependents. Suffice it to say that these cases would not typically present the complex and subjective issues raised in disability cessation cases. The Government's numbers are further inflated because they rest on each of the erroneous assumptions set forth below.

1. It assumes that preliminary hearings would require a full two months over and above the time which would be required to afford notice, an opportunity to examine adverse evidence and to file a written statement—all of which the Government has now promised to provide. We do not understand why that is so and the Government has not explained why this substantial delay would be necessary.

2. It assumes that the Government cannot recover any payment improperly made during the period following an initial determination that disability has ceased and before a hearing is held. The Government has substantial powers to recover any "overpayments" of disability payments by reducing future social security payments, settlement, or civil litigation. *See* 42 U.S.C. § 404.

3. It assumes that none of these "overpayments" falls within those categories of "overpayments" as to which "waiver" of the Government's claim is mandated by the Act. 42 U.S.C. § 404. Any payments which should be waived in furtherance of the Act surely do not constitute an unwarranted drain on the Trust Fund.

4. It assumes that the opportunity for a hearing will be grossly abused and that *all* recipients, whether or not they have a colorable claim, will seek hearings in an effort to gain unwarranted payments. This fear of frivolous and unanimous requests for hearing is wholly unsubstantiated and belied by actual experience. A majority of recipients either forego or neglect their opportunity for post-termination hearings. There has been no evidence whatsoever of abuse in the welfare area where pre-termination hearings have been required by statute or regulations. *See* Brief of Appellees, *Goldberg v. Kelly*, at 57-58.[16]

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[16] The District of Columbia experience with welfare hearings is illustrative. D.C. welfare recipients have had a right to hearing prior to termination, suspension, or reduction of payments since December 1968. D.C. Reg. No. 68-20. Statistics for the period from January through June 1970 (the only period for which statistics are available) indicate that welfare payments in 3,143 cases were terminated. There were 270 requests for hearings. Of the 270 cases decided, 160 were

5. Finally, the Government assumes that the initial disability cessation determination would be *sustained* at all hearings. The fact is that in roughly half of the cases in which hearings are now held, the initial determination is reversed and the recipient is found entitled to payments. Additional costs could possibly be occasioned only where the hearing decision was adverse to the recipient.

CONCLUSION

The minimal procedural protections we seek are not mere technical formalities. The right to a hearing is vital to the fair resolution of disputed facts, and the importance of that right has been borne out in the disability area where a vast number of errors have been rectified by the untimely hearings now provided. For many, adverse summary terminations are devastating, forcing disabled persons to cast about for many months in an effort to find some other form of support for their most basic needs. As this Court has said:

> "... there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent v. United States*, 383 U.S. 541, 554 (1966).

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in favor of recipients while 110 sustained proposed agency action. HEW Reports: DHEW Publication No. SRS 72-03257, NCSS Report A-9 (1-3/70), and NCSS Report A-11 (4-6/70).

That "ceremony" should include, at the least, the "minimal" protections mandated by this Court in other cases and cannot be satisfied by a "hearing on paper."

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

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OCTOBER TERM, 1971

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

We indicated in our main brief (p. 22) that with respect to suspensions and terminations of disability benefits, the Secretary, in order to afford reasonable notice and opportunity to participate in the determination proceedings, would adopt procedures whereby

the beneficiary will be informed of the proposed adverse action and the information upon which it is based and will be given the opportunity to respond in writing before adverse action, if any, is taken.

Such procedures governing determinations of disability cessation by State agencies have now been adopted and put into effect by the Secretary.[1] Under these procedures, State Agencies are instructed to initiate suspension of benefits only when the evidence convincingly establishes a basis for a determination that disability has ceased and the State Agency cannot complete its final determination soon enough to prevent overpayments from being made (Dis. Ins. State Manual § 265.1 A) (App., *infra*, p. 7). Before requesting the Bureau of Disability Insurance to suspend benefits, State Agencies are required to inform the beneficiary, either by telephone or mail, of the proposed suspension and the reasons for it and to request the beneficiary to submit, promptly or where appropriate within a reasonable additional time, any rebuttal evidence or reply the beneficiary desires to be considered (Dis. Ins. State Manual § 265.1 D) (App., *infra*, p. 9). And before termination of benefits, where the medical evidence conflicts in any way with the beneficiary's assessment of the severity of his impairment or of the date of cessation of his impairment, State Agencies are required to inform the beneficiary, either by telephone or mail, of the

[1] See Disability Insurance State Manual Transmittal Letter Number 66 and the attached revised sections of the Disability Insurance State Manual, a copy of which has been filed with this Court. Pertinent provisions are included in an Appendix to this brief, *infra* pp. 4 to 21.

proposed termination and the evidence on which it is based and to give the beneficiary at least ten working days to respond in writing and, if he wishes, an additional twenty to thirty days to obtain and submit additional evidence in support of his claim (Dis. Ins. State Manual § 353.6) (App., *infra*, pp. 19–21). The Secretary is presently developing a similar termination procedure to cover terminations in cases involving a return to work but no issue of medical recovery.

Also, the Secretary is presently developing a procedure similar to the above, requiring notice and an opportunity to respond, for inclusion in the Claims Manual to govern continuing disability investigations by Social Security Administration district offices.[1]

These procedures, together with those already in effect for continuing disability investigations prior to suspension or termination of disability benefits, we submit, satisfy the requirements of due process.

Respectfully submitted.

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JANUARY 1972.

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[1] See Dis. Ins. State Manual Trans. Letter No. 66, para. 2 (App., *infra*, p. 4).

APPENDIX

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL SECURITY ADMINISTRATION

DISABILITY INSURANCE STATE MANUAL TRANSMITTAL

(Letter Number 66)

DECEMBER 27, 1971.

To: All Holders of the DISM.

From: Social Security Administration.

Subject: Continuing Disability Policy and Procedures Sections 265ff and 353ff—Due Process Requirements.

The overall purpose of this transmittal is to clarify and sharpen policies and procedures for determining continuance or cessation of a beneficiary's disability. A paramount objective of the revisions is to assure that before any determination is made (1) we are in possession of all pertinent evidence of record and (2) that the evidence in file including the results of any consultative examination that was done is of sufficient probative value to permit making a sound determination. This principle applies to determinations to suspend benefits pending final determination as to continuing eligibility, as well as to determinations as to continuing disability.

When a beneficiary is contacted during a continuing disability investigation, he should be informed at the outset of the reason for the inquiry. He must also be given opportunity to make a statement about whether he feels he is still under disability, to present evidence,

and/or to rebut other evidence introduced which is adverse to his interest.

Included in the transmittal are updated policies and procedures which include certain revisions for processing continuing disability cases involving medical reexamination diaries previously set forth in DHL HI-9, §§ 265ff. These instructions are expanded to require the State agency to notify a beneficiary where it proposes to suspend benefits (as the DO is now required to do) and to give the beneficiary opportunity before such suspension action is taken to submit any rebutting evidence which he thinks is relevant to the decision. In addition, the instruction has been revised (1) to restrict the State agency telegram procedure for requesting suspension of benefits to those situations where cessation of disability is established, but the final determination of the SA cannot be processed through BDI soon enough to prevent (additional) overpayment(s), and (2) to change the data to be furnished where telegram is sent to permit immediate action upon its receipt in BDI.

The instruction also introduces a new flag (Form SSA-2456, Potential Overpayment Case) for use in all cessation cases where it was not appropriate to use the telegram suspension procedure, but where an overpayment nevertheless has occurred or potential overpayment is imminent.

§ 353.2 This material has been rearranged. In addition, more stress is placed on the need to obtain additional medical evidence when the evidence in file is not wholly convincing. This might be because the evidence is incomplete, there is a material conflict, or when the beneficiary's disagreement with the evidence raises a material question. Evidence must be convincing not only that a disability ceased, but also when

it ceased. The SA is cautioned to avoid making a determination that cessation occurred in a past month unless the evidence convincingly supports such a finding.

§§ 353.3 and 353.4 These sections explain that during the continuing disability investigation the beneficiary should be asked for a statement of his opinion about his current medical condition and his ability to work.

He should also be asked to identify medical sources that have treated him recently and may be able to furnish medical evidence needed in making determination as to his continuing disability. These sections incorporate, with some modification to reflect operating experience, the basic provisions introduced in DIL III-9 for conducting CDI's involving medical issues. The model guideletter (Form SSA-9577 contained in the DIL) has been revised and re-numbered SSA-454a. (Social Security Disability Beneficiary Report). To promote uniformity of development this new form is to be utilized by SA's, regardless of whether the CDI development with the beneficiary is by mail or by telephone.

These instructions reemphasize existing policy that medical evidence of a beneficiary's current condition should always be initially requested from the beneficiary's current treating source. When this evidence materially conflicts with the beneficiary's own statement concerning whether his disability continues, or when the evidence is not convincing as to whether disability continues or has ceased, a CE should be obtained.

§ 353.4C explains the conditions under which it is necessary to obtain written confirmation of certain medical information received by telephone.

§ 353.5 expands and clarifies existing instructions on evaluation of continuing disability cases.

§ 353.6 is a new section which requires the SA to undertake a subsequent contact with beneficiaries prior to effectuation of a determination of cessation where the medical evidence conflicts in any way with the beneficiary's assessment about the severity of his impairment or about the date of cessation. Model language is given when it is necessary for the SA to so contact a beneficiary.

It is recommended that these instructions be studied carefully and be the topic for staff discussion and training. * * *

The Disability Insurance State Manual, as modified effective December 27, 1971, provides in pertinent part:

265.1 When to Request That BDI Suspend Benefits Pending Determination As to Whether Disability Continues

A. *General.*—The SA should initiate action to suspend benefits only (1) when the evidence convincingly establishes a basis for a determination of cessation of disability (see § 350ff); (2) the beneficiary is in payment status; and (3) the SA cannot complete its final determination soon enough to prevent an overpayment from being made.

This would apply in a medical recovery case, for example, where cessation of disability occurred more than 2 months ago but further development must be made to check out the possibility of an even earlier cessation date. Similarly, in a return to work case, suspension action would be called for where return to work demonstrating ability to engage in SGA occurred more than 11 months ago if the beneficiary is entitled to a TWP, or more than 2 months ago if he is not.

B. *How to Establish Whether Benefits Are Being Paid.*—

1. *General.* In all DIB cases where the evidence points to cessation, the SA should de-

termine whether benefits are currently being paid. The SA may conclude that benefits have already been suspended if the file reflects one or more of the following:

A special "Benefits Suspended" flag, Form SSA-529, is attached to the folder; or

Form SSA-881 is checked to show *"Benefit Payments have been suspended"* (item 8 of 2/70 printing); or

The folder contains a copy of a telegram from a DO to BDI requesting suspension of benefits (and benefits have not been reinstated); or

A Form SSA-510 (Determination of Termination of Entitlement or Suspension of Payments Based on Supporting Evidence in File) showing benefits are stopped is on the left side of the file.

2. *When Benefits Have Been Stopped.* In some cases where BDI is convinced that a cessation will result and an overpayment may occur, benefits will have been stopped before the case is sent to the SA. In other instances, the DO, after its continuing disability investigation, may request BDI by telegram to suspend benefits.

If benefits have been stopped, the SA should complete any necessary development, prepare the determination, and expedite transmittal of the folder to BDI (see § 265.3).

C. *When BDI Must Receive a Suspension Notice to Stop a Given Month's Check.*—Regular monthly checks to beneficiaries are dated the 3rd of the month and represent payment for the preceding month. The checks are released by the Treasury to the Postal Service on the last several working days of a month. To stop any such check, a request to suspend must ordinarily be *received* in BDI prior to the last 10 working days of the month.

D. *Providing the Beneficiary Opportunity to Present Evidence Before Suspension.*—Before proceeding to request suspension, inform the beneficiary (or payee) of the proposed suspension action, the reasons therefore, and document the file accordingly. The notice to the beneficiary may be by telephone. The beneficiary should be requested to reply promptly and, as appropriate, given reasonable additional time to submit evidence. Where development is by mail, see § 353.6 for a letter that can be adapted to "suspension" situations.

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267. Possible Subsequent Period of Disability

Where disability has ceased and it appears that the individual may again be under a disability, enter an appropriate remark to that effect on Form SSA–833 or Form OAAD–408 (Route Slip).

However, if the evidence *clearly* establishes that the individual is again under a disability, the State agency may prepare a determination (OA–D831) in the usual manner with the exception that the "date of application" items should not be completed. SSA will contact the individual for a new application.

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353. Medical Recovery

353.1 General

A determination that disability has ceased will be made where the medical and vocational evidence establishes a capacity for substantial gainful activity, whether or not the beneficiary returns to work.

Issues of medical recovery generally arise in cases which have been scheduled for medical reexamination in accordance with § 347ff. When the reexamination date is reached, a continuing disability investigation will usually be initiated. The following sections govern the development and adjudication of continuing

disability cases involving issues of medical recovery.

353.2 Possible Medical Recovery—Return to Work

A. *General.*—If a beneficiary's impairment might reasonably have been expected to improve (i.e., a medical reexamination diary was correctly established in accordance with §§ 348.1 or 349.1), a subsequent return to work before the month of the scheduled medical reexamination is considered as a possible indication of medical recovery and the case is sent to the DO for development. Upon completion of the DO development, the case is sent to the SA. The SA must carefully consider the development already undertaken to determine whether further medical documentation is needed and, if so, the type and extent necessary for a sound determination of continuance or cessation.

B. *Clear-Cut Cessation (Medical).*—In certain clear-cut cases, cessation may be found without current medical development on the basis of medical recovery as of the first month of return to full-time work with no significant medical restrictions. Where there is no evidence to the contrary, the evidence of record regarding the anticipated medical recovery may reasonably support a finding that the return to full-time work with no significant medical restrictions was occasioned by sufficient medical improvement (i.e., that the individual, by returning to full-time work has clearly demonstrated that he has recovered to the extent that he has regained the ability to engage in SGA).

Example: The evidence obtained during the initial case processing revealed that the individual had an impairment with marked functional restrictions which was expected to continue for more than 12 months but that recovery was expected 18 months after onset and a medical reexamination was established accordingly. Upon notice by the beneficiary that he

returned to work, a CDI was initiated. The district office CDI interview disclosed that 16 months after onset the beneficiary returned to full-time work earning $400 a month. He stated that his doctor said he could return to work and did not impose any medical restrictions. Cessation for medical improvement, without additional development, should be found in the 16th month after onset. (On Form SSA–833, Determination of "Cessation or Continuance of Disability", Item 11B, should be checked. In Item 12, Evidence and Reasoning, the finding of cessation should be based on medical recovery and not on the services rendered during the trial work period, which under the law may not be used as the sole basis for termination until the trial work period is completed.)

C. *Evidence of Record Inconclusive.*—In all cases where the evidence in the record is inconclusive (e.g., working part-time, allegations of continued disability or work contrary to medical advice), current medical development should be undertaken to resolve the issue of medical recovery (see § 353.4). For example, had the individual described in the example above returned to part-time work, current medical development would have to be undertaken because it is not clear he has fully recovered.

D. *Continuance.*—If it is found that the individual is working despite a continued severe impairment and such work is within the trial work period, a finding of continuance should be made. In no instance should the work by itself be considered a basis for cessation until the expiration of the trial work period (see § 352.4 above). Upon expiration of the trial work period, the work should be evaluated in accordance with § 330ff.

When preparing a continuance determination in a case where the individual has been working less than 9 months, if further and substantial improvement is anticipated (§§ 347ff), the SA should indicate the appropriate date for a

subsequent medical reexamination diary. However, ordinarily the diary should not be scheduled earlier than the anticipated 9th month of work, at which time, an investigation of both the medical improvement issue and work activity may be conducted simultaneously. If cessation is justified on the basis of substantial gainful activity, medical development would be unnecessary. However, if at the expiration of the anticipated 9th month of work it is found that the individual did not, in fact, work in all 9 months or his work does not constitute SGA, his case will still be investigated from a medical improvement standpoint.

E. *Cessation.*—Where the SA obtains current medical evidence which indicates a cessation is in order, the SA should find cessation in the month established by the medical evidence, irrespective of whether this coincides with the month of return to work. Retroactive cessation to the month work began should not be found unless the facts (medical and work) convincingly demonstrate the propriety of such action (see § 353.5). For example, if the beneficiary was still severely impaired at the time he returned to work but recovered by the time of a consultative examination, the month of cessation would be the month of the consultative examination rather than the month of work resumption.

353.3 Possible Medical Recovery—No Return to Work

A. *General.*—Cases involving matured medical reexamination diaries and other issues of possible recovery, such as, report of release from a hospital, report of improvement, etc., will be sent directly to State agencies on Form SSA–847 (BDI Request for Case Action). Cases transmitted under this section (where the beneficiary has not reported a return to work) will be noted on Transmittal "Re Exam Diary, etc. CDI § 353.3".

B. *State Agency Action.*—The SA will review the file in accordance with the following instructions and contact the beneficiary and appropriate medical sources to obtain the evidence that is necessary to determine if disability is continuing or has ceased. When information is received that the beneficiary has returned to work, the SA will utilize the adjudicative concepts under § 353.2.

Occasionally, SA's may find that a medical reexamination should not have been scheduled (§§ 347ff). In other cases, the file may reveal that the beneficiary has died or is hospitalized so that there is no current CD issue. The SA will return such cases to BDI on route slip Form OAAD–408 (without an SSA–833) with an appropriate notation under remarks such as, "No CD Issue—Beneficiary Hospitalized (give reason)" or "No CD Issue—Beneficiary Died". Include in the folder any supporting evidence; where appropriate, prepare a report of contact (see subsection IIA2b of DIL II–36—Transmittal of Folders to SSA).

1. *Initial State Agency Contact with Beneficiary*—The SA will contact the beneficiary to inform him that it has been requested by SSA to determine whether he continues to be unable to engage in SGA by reason of his impairment and to obtain information concerning: (1) sources of medical treatment, and (2) his participation (including any work) in a State VR program, if any, and (3) his opinion as to whether his condition has improved so that he is able to return to work. This initial contact may be made by mail or telephone.

a. *Contact is by Mail*—Form SSA–454(a) (Social Security Disability Benefit Report) (Exhibit 8a) should be used where the contact is made by mail. Complete the form by entering the SA name and address, the date, the beneficiary's social security number, name, and address, and the SA's director's name (or his designee). A pre-addressed, postage paid envelope

should be included. If a reply is not received, an appropriate followup (by mail or phone) should be made as soon as possible but not later than *two* weeks after the initial mailing. If the form is returned and the response is adequate follow § 353.4. If the response is not adequate or not received, develop through the district office in accordance with (B)(2) below.

b. *Contact is by Telephone*—Where the initial contact is made by telephone, the SA should use Form SSA–454(a) as a guide to assure that all pertinent questions are asked. The beneficiary's answers should be recorded on the SSA–454(a) and the form annotated to show that the information resulted from a telephone conversation. Always record the name of the person providing the information on the form. The beneficiary (or payee) should be informed that the information he furnishes (and other information received) will be used to determine his continuing entitlement to disability benefits. Send a copy of the completed SSA–454(a) to the beneficiary for his information, any necessary revision, his signature, and prompt return.

The check-payee (i.e., the beneficiary or his designated representative) is responsible for reporting events affecting payments. In the interest of assuring administrative due process in continuing disability investigations, the SA will initially attempt to conduct the telephone (or mail) contact with such payee. When the SA contact is with someone other than the check-payee, the SA should satisfy itself that he is an acceptable source before requesting information to complete the form, i.e., a competent adult in a position to supply reliable information *on the beneficiary's behalf*. For example, the SA may telephone the beneficiary in an effort to secure information needed to document its continuing disability investigation. The beneficiary's wife residing at the same address answers the phone and explains that the beneficiary is working.

She provides full details. As in the preceding paragraph, send a copy of the report to the beneficiary (or representative payee) and ask his confirmation in writing whether the facts reported are accurate.

2. *Requesting DO Assistance.*—There may be situations where the SA is unable to complete its development without the assistance of the district office. When it is necessary to forward a file to the district office, use Form SSA–883 (Request for Evidence or Assistance—Disability Cases) and give an appropriate explanation of development needed.

Situations in which the SA may request district office assistance, will include cases where

The beneficiary has not responded (after appropriate follow-ups by mail or telephone) to requests for information, or

The beneficiary response is inadequate to resolve the issues raised, or

Assistance is needed in securing specific information and the SA believes the DO is in a better position to obtain it.

When a personal contact is made by the DO, an SSA–454 (Report of Continuing Disability Interview) will usually be completed as well as a Form SSA–821 (Work Activity Report) where indicated. Upon completion of its action, the district office will return to folder to the SA. In cases where the DO is unable to contact or locate the beneficiary, the case will be processed in accordance with §§ 356ff.

353.4 Development of Medical Evidence

A. *Development of Current Evidence.*—

1. *Evidence of Record.*—If the beneficiary reports that he has returned to full-time work and there is no indication of significant medical restrictions, no further medical development is needed (§ 353.2B). Otherwise, the SA must develop appropriate evidence from medical sources (such evidence should be developed even though the beneficiary reports that he has recovered sufficiently to be able to engage in

SGA). The responsibility for medical development in continuing disability is placed primarily upon the State agencies. If the beneficiary has a current treatment source, that source should always be requested to furnish evidence of record describing the beneficiary's current condition. Even though it may be necessary to request a CE to resolve the question of continuing disability, the presence in file of reports from the beneficiary's medical sources will better insure that no pertinent evidence has been overlooked and thus insure the soundest possible basis for making determinations.

2. *Consultative Examinations.*—When evidence of record concerning the beneficiary's condition is not available, is not based on a recent examination and for this reason is not convincing about the beneficiary's current condition, or is not sufficiently detailed in terms of signs, symptoms, and laboratory findings to enable a sound independent medical judgment to be made, a consultative examination should be purchased. In selecting a consultative examiner the attending physician should be given first consideration (see § 244). When contacting the attending physician, special care should be exercised to clearly explain the reason for requesting a current examination, i.e., to determine whether the individual may continue to receive disability benefits because he still has a severe impairment, or whether his condition has so significantly improved that he would no longer be entitled to disability benefits. Also explain that his report could be the basis for a decision which would result in the termination of the individual's disability benefits. Some physicians ma, be very reluctant to serve as the sole or primary source of information which might result in the loss of benefits for their patients. Where the attending physician objects to performing a current examination for the SA, other examination sources should be utilized.

B. *Conflicts Between Beneficiary and His Medical Source.*—Ordinarily, where improvement occurs which permits return to work, this fact will have already been communicated by the attending physician to the beneficiary. If, however, when contacted in accordance with § 353.3B(1), the beneficiary states that his doctor did not recommend that he return to work, or the beneficiary still feels he is unable to work because of his impairment, but the medical evidence received from his attending physician indicates that the beneficiary is no longer disabled, there is a conflict that needs to be resolved. The sensitivities involved here suggest the need for delicate handling. In some cases it may be desirable to arrange for a CE by an independent medical source before making a determination.

C. *Documenting File.*—Material medical source evidence used to establish that the beneficiary is no longer under a disability should be in writing, signed by the source of the information, and the source should be properly identified. Therefore, when development of such evidence is accomplished by telephone, a copy of the report should be sent to the source for signature and return. An exception can be made where a signed, written report was previously received during the current investigation and it is necessary only to confirm some detail by telephone; here, a report of telephone conversation signed by the SA examiner is sufficient (see §§ 216 and 217).

353.5 Evaluation of Medical Evidence

A. *General.*—Where return to work does not provide a basis for cessation based on SGA after a TWP (§ 352.5), or under the clear-cut concept of medical recovery (§ 353.2B), evidence from medical sources describing the beneficiary's current medical condition (see B below) will be controlling in arriving at a decision. As in the case of establishing entitle-

ment to benefits initially, the relevant medical evidence for determining continuing disability must be sufficiently detailed as to signs, symptoms, and laboratory findings to enable a sound judgment to be made by an independent reviewer of the record. Detail is especially needed when certain evidence indicates cessation but the beneficiary says that he is unable to return to work because of his impairment, or that his doctor has placed restrictions on how much or what kind of work he may do.

B. *Evaluation Guides for Determining Whether Disability Continues.*—The standards and the evaluation guidelines that apply in determining initial entitlement to benefits also apply for determining whether disability continues. There could be exceptional situations encountered, however, where though the CDI reviewer is of the view that disability does not presently exist, there is evidence that medical improvement has not occurred since the initial disability determination of allowance or the most recent continuance determination. In other words, there may be a question whether the individual was properly entitled to benefits in the first place or whether benefits should have been previously continued. In this situation, absent significant improvement in vocational competence (as described below), the only recourse is reopening the previous favorable determination. This in turn is limited by the rules of administrative finality (see § 277(A)(1). Such reopening (when requested by BDI) should be done, however, only where the previous determination is wholly unsupportable by the evidence not just because of differences in judgment. In a rare case, where the medical evidence is such that the question of improvement cannot be resolved, that is, functional loss at the time of the CDI cannot be satisfactorily compared with the functional loss at the time of a previous finding

of disability, a determination as to continuing disability may be made on the basis of current assessment of the beneficiary's condition.

Where the beneficiary's medical condition remains unchanged, but his vocational competence has improved significantly, e.g., he has acquired new relevant skills by reason of completing a training course in vocational rehabilitation, a new evaluation in terms of present capacity to engage in SGA would be required in accordance with DIL III–3. (Identify any cessation determination prepared under this paragraph for policy review and route folder to BDI in accordance with section II(A)(2)(a) of DIL II–36.)

353.6 Subsequent Contact with Beneficiary Prior to Effectuation of Determination of Cessation

A. *Evidence Conflicts with Beneficiary's Allegations.*—Where the medical evidence conflicts in any way with the beneficiary's assessment about the severity of his impairment, or about the date of cessation of such impairment, the beneficiary should be again contacted before a determination of cessation is made. A conflict arises when the beneficiary has informed the SA that his condition has not improved (Item 1(a) of the SSA–454(a) is answered "No") but the medical and other CD evidence justifies a cessation of disability (see § 353.4). The beneficiary should be informed by mail or telephone of the proposed adverse action and of the evidence on which it is based and be given a reasonable opportunity (i.e., at least 10 working days) to respond in writing; if he wishes to obtain and submit additional evidence which may be material in support of his claim, he may be granted an additional time (i.e., 20–30 days) to present such evidence.

When it is necessary to so contact a beneficiary (entitled as a DIB, DWB or CDB)

by mail, the following model language should be used before adverse action, if any, is taken:

"We previously informed you that we were asked by the Social Security Administration to help determine whether your impairment still prevents you from working. Although you indicate on the report you recently completed for us that you do not feel your condition has improved so that you are able to return to work, the other information and evidence in your case shows that you are able to work, and have been, since the SA will (1) enter the date of the proposed cessation based on the CD evidence of record, (2) provide a brief summary of the evidence on which the proposed adverse action is predicated and enclose a self-addressed postage paid return envelope for beneficiary's response. Therefore, disability benefits being paid on your social security number must be stopped unless additional evidence is submitted which shows that you are still unable to work because of your impairment.

"If you have any additional information you want us to consider, please let us know immediately, using the enclosed envelope; a reasonable additional amount of time will be granted where necessary for you to obtain and submit additional evidence. If we do not hear from you within 10 days, we will forward your records to the Social Security Administration and when a formal decision is made you will be notified.

"Under the social security law, benefits may be paid for a 3-month period of adjustment. This period includes the month in which you have a regained ability to work and two additional months."

The SA will hold the file for a maximum of 15 days while awaiting beneficiary's response. Where the beneficiary submits additional evidence, it should be evaluated along with the CD evidence of record. If the beneficiary does not

respond or if the response from the beneficiary does not alter the proposed finding of cessation, the SA will prepare the determination and process the case.

B. *SA Notice to Beneficiary of Proposed Suspension Action.*—As in "A" above, the SA should always advise the beneficiary (or his representative) of any proposed action to suspend benefits (in accordance with § 265.1D), before taking action to recommend suspension to BDI.

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U.S. GOVERNMENT PRINTING OFFICE: 1972

RICHARDSON, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WRIGHT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 70-161. Argued January 13, 1972—Decided Febrary 24, 1972*

In light of the adoption of new regulations providing that a recipient of disability benefit payments pursuant to § 225 of the Social Security Act be given notice of a proposed suspension of payments and the reasons therefor, plus an opportunity to submit rebuttal evidence, the judgment is vacated to permit reprocessing, under the new regulations, of the disputed determinations.

321 F. Supp. 383, vacated and remanded.

Assistant Attorney General Gray argued the cause for appellant in No. 70-161 and for appellee in No. 70-5211. With him on the briefs were *Solicitor General Griswold, Kathryn H. Baldwin, Wilmot R. Hastings, Edwin H. Yourman,* and *Paul Merlin.*

Robert N. Sayler argued the cause and filed briefs for appellees in No. 70-161 and for appellants in No. 70-5211.

Briefs of *amici curiae* in both cases were filed by *Thomas L. Fike* for the Legal Aid Society of Alameda County; by *David H. Marlin* and *Jonathan A. Weiss* for the National Council of Senior Citizens; and by *Albert C. Neimeth* for Luella H. Mills et al. *Bernard P. Becker* and *Harvey N. Schmidt* filed a brief for Stella Van Guilder et al. as *amici curiae.*

PER CURIAM.

We noted probable jurisdiction of these appeals, 404 U. S. 819 (1971), to consider the applicability of *Gold-*

*Together with No. 70-5211, *Wright et al.* v. *Richardson, Secretary of Health, Education, and Welfare,* also on appeal from the same court.

berg v. *Kelly*, 397 U. S. 254 (1970), to the suspension and termination of disability benefit payments pursuant to § 225 of the Social Security Act, 70 Stat. 817, 42 U. S. C. § 425, and implementing regulations of the Department of Health, Education, and Welfare. Shortly before oral argument, we were advised that the Secretary had adopted new regulations, effective December 27, 1971, governing the procedures to be followed by the Social Security Administration in determining whether to suspend or terminate disability benefits. These procedures include the requirement that a recipient of benefits be given notice of a proposed suspension and the reasons therefor, plus an opportunity to submit rebuttal evidence. In light of that development, we believe that the appropriate course is to withhold judicial action pending reprocessing, under the new regulations, of the determinations here in dispute. If that process results in a determination of entitlement to disability benefits, there will be no need to consider the constitutional claim that claimants are entitled to an opportunity to make an *oral* presentation. In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise. Accordingly, we vacate the judgment of the District Court for the District of Columbia, 321 F. Supp. 383 (1971), with direction to that court to remand the cause to the Secretary and to retain jurisdiction for such further proceedings, if any, as may be necessary upon completion of the administrative procedure.

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

While I join MR. JUSTICE BRENNAN who reaches the merits, I add a word about the unwisdom of the policy pursued by the Court.

A three-judge district court held § 225 of the Social Security Act, 42 U. S. C. § 425, unconstitutional, insofar as it purported to authorize the Secretary of Health, Education, and Welfare to suspend the payment of social security disability benefits without giving prior notice and "an opportunity to participate" to the disability beneficiary. 321 F. Supp. 383, 386. The court remanded the cause to the Secretary for the formulation of new procedures consistent with its opinion. Judge Matthews, troubled by an implication in the majority's opinion that participation merely by way of written submissions might satisfy the majority's notions of due process, dissented "from so much of the opinion as seems to suggest that the procedural requirements of due process may be satisfied with something less than the 'opportunity' [to participate] specified in [*Goldberg* v. *Kelly*, 397 U. S. 254]." *Id.*, at 388. We noted probable jurisdiction in these cross-appeals to evaluate the opinion below in light of *Goldberg*. 404 U. S. 819.

Now, however, it is suggested that the Secretary has so far complied with the instructions of the District Court to formulate new procedures that we should remand the cases to the District Court for further proceedings in light of these new requirements. Such a course, I submit, would be a perversion of the philosophy of due process that we expressed in *Goldberg*.

Judge Matthews, below, captured the essence of *Goldberg* in her brief partial dissent:

> "In *Goldberg* the Supreme Court held that a welfare recipient, in addition to timely and adequate notice detailing the reasons for a proposed termination of benefits, must have 'an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.'" 321 F. Supp., at 387–388.

It cannot seriously be argued that the Secretary's "new rules" comport with *Goldberg*. They may cure the notice defect, but they make no provision whatsoever for the presentation of oral testimony or the confrontation of witnesses.[1] We noted jurisdiction, I thought, to determine if the difference between "welfare" payments and "disability" payments is sufficient to say that one's Fifth Amendment right to be heard may be satisfied by an opportunity to make written submissions in the latter case, although not in the former.[2] We heard oral argument on this basis. Because of the inadequacy of the new rules, in light of *Goldberg*, the question will remain regardless of the outcome of a remand.

I think it unseemly, needlessly to shuttle any litigant, especially an indigent, back and forth from court to court, hoping that his exhaustion of newly created remedies will somehow or other make his problem disappear and relieve us of an obligation. No concession promising justice to the claimants has been made. The issue of due process

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[1] The new provisions were issued as amendments to the Disability Insurance State Manual (DISM). DISM § 265.1D now requires state agencies to inform a beneficiary of a proposed suspension of benefits, and the reasons therefor, before it formally requests the Bureau of Disability Insurance to authorize the suspension. The beneficiary must also be given an opportunity to submit rebuttal evidence. *Ibid.* But the "opportunity" contemplated by this section, and the similar provisions respecting cessation of benefits (DISM § 353.6A), encompass only written submissions.

[2] This cause, however, like *Goldberg*, "presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues." 397 U. S., at 268 n. 15. Disability cases, like welfare cases, invariably turn on difficult and complex resolutions of hotly disputed factual questions. See, *e. g.*, *Underwood* v. *Ribicoff*, 298 F. 2d 850, 851 (CA4 1962).

was properly raised and is here for decision; and all the requirements of case or controversy within the meaning of Art. III of the Constitution have been satisfied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

I respectfully dissent. The Court justifies today's *sua sponte* action on the ground that if reprocessing under the Secretary's new regulations "results in a determination of entitlement to disability benefits, there will be no need to consider the constitutional claim that claimants are entitled to an opportunity to make an *oral* presentation." (Emphasis by the Court.) Avoidance of unnecessary constitutional decisions is certainly a preferred practice when appropriate. But that course is inappropriate, indeed irresponsible, in this instance. We will not avoid the necessity of deciding the important constitutional question presented by claimants even should they prevail upon the Secretary's reconsideration. The question is being pressed all over the country. The Secretary's brief lists no less than seven cases presenting it with respect to disability benefits and 10 cases presenting it with respect to nondisability benefits.[1]

[1] "The issue regarding a right to a hearing prior to suspension or termination of disability benefits is presented in a number of other cases: *Doyle* v. *Richardson* (C.A. 5, No. 31,104); *Moore* v. *Richardson* (N.D. Calif., Civ. No. C-70-2573); *Eldridge* v. *Richardson* (W.D. Va., Civ. No. 70-C-52-A) (dismissed May 6, 1971); *Dye* v. *Richardson* (W.D. Pa., Civ. No. 70-1384) (dismissed March 8, 1971); *Harvey* v. *Richardson* (W.D. Pa., Civ. No. 70-1460); *Rodriquez* v. *Finch* (D. Colo., Civ. No. C-2294) (dismissed July 1, 1971); *Olivas* v. *Secretary of HEW* (D. Colo., Civ. No. C-2262). The issue is also presented in several nondisability cases: *Anderson* v. *Finch* (N.D. Ohio, Civ. No. 70-425, decided January 15, 1971, and pending before C.A. 6, No. 71-1317); *Garofalo* v. *Richardson* (S.D.N.Y., Civ. No. 70-5133) (remanded July 16, 1971); *Lindsay* v. *Richardson*

The Secretary's new regulations permit discontinuance of disability benefits without affording beneficiaries procedural due process either in the form mandated by *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), or in the form mandated by the District Court, 321 F. Supp. 383 (DC 1971). The regulations require only that the beneficiary be informed of the proposed suspension or termination and the information upon which it is based and be given an opportunity to submit a written response before benefits are cut off.[2] This procedure does not afford the beneficiary, as *Goldberg* requires for welfare and old-age recipients, an evidentiary hearing at which he may personally appear to offer oral evidence and confront and cross-examine adverse witnesses. Nor does the procedure satisfy the requirements of due process as determined by the District Court. That court held that the beneficiary must be given not only notice but also, before he responds, a "reasonable opportunity to examine the documentary evidence" upon which the Secretary relies and, in case of conflict in the evidence, a decision by an impartial decisionmaker. The court said, however, that an evidentiary hearing and opportunity to confront adverse witnesses

(W.D. N.C., Civ. No. 2794); *Van Guilder* v. *Richardson* (D. Minn., Civ. No. 4-70-386); *Hopkins* v. *Richardson* (E.D. Pa., Civ. No. 71-37); *Shisslak* v. *H. E. W.* (D. Ariz., Civ. No. 71-35 TUC, decided April 9, 1971 and pending before C.A. 9, No. 71-2060); *Baker* v. *Finch* (N.D. Ga., Civ. No. 13786, decided September 13, 1971); *Corona* v. *Richardson* (N.D. Calif., Civ. No. 70-2662); *Recide* v. *Richardson* (D. Hawaii, Civ. No. 70-3426); *Mills* v. *Richardson* (N.D.N.Y., Civ. No. 71-CV-208, decided October 15, 1971)." Brief for the Secretary 8-9, n. 9.

[2] Apparently the new procedures apply only to cases involving issues of medical recovery. We are advised, however, that "[t]he Secretary is presently developing a similar termination procedure to cover terminations in cases involving a return to work but no issue of medical recovery." Supplemental Brief for the Secretary 3.

were not necessary, although "a hearing could be held" if the beneficiary "submitted some evidence that contradicts that possessed by the Administration." 321 F. Supp., at 387. Thus, under both *Goldberg* and the District Court's decision, the omissions in the Secretary's new regulations are fatal to the constitutional adequacy of the procedures. Because we may imminently be confronted with another case presenting the question, and because its resolution is vitally essential to the administration of an important Government program, today's action in avoiding decision of the constitutional question is not a responsible exercise of that practice. We gain a brief respite for ourselves while the Secretary, state agencies, and beneficiaries continue confused and uncertain. Moreover, the question has been thoroughly and ably argued and briefed on both sides, and we have the benefit of thoughtful and well considered majority and dissenting opinions in the District Court. Today's disposition results in an unjustified waste, not only of our own all too sparse time and energies, but also of the time and energies of the three judges of the District Court who must again suspend their own heavy calendars to assemble for what can only be an empty exercise. I cannot join in the Court's abdication of our responsibility to decide this case.

Both the beneficiaries and the Secretary appeal from the District Court's judgment. The beneficiaries contend that the District Court erred in not holding that the procedure must afford an evidentiary hearing as in *Goldberg*. The Secretary contends that procedural due process requirements are satisfied by the "paper" hearing afforded by his new regulations. I agree with the beneficiaries and would therefore vacate the judgment of the District Court and remand with direction to enter a new judgment requiring the procedures held in *Goldberg* to be requisite with respect to discontinuance of welfare

and old-age benefits. See *Wheeler* v. *Montgomery*, 397 U. S. 280 (1970).

Section 225 of the Social Security Act, 42 U. S. C. § 425, provides that "[i]f the Secretary, on the basis of information obtained by or submitted to him, believes that an individual entitled to benefits . . . may have ceased to be under a disability, the Secretary may suspend the payment of benefits . . . until it is determined . . . whether or not such individual's disability has ceased or until the Secretary believes that such disability has not ceased." The District Court held the statute unconstitutional on the ground that "[t]he ex-parte suspension power granted to the Secretary by section 225 is summary adjudication that is inconsistent with the requirements of due process." 321 F. Supp., at 386.

The Secretary does not challenge that holding in this Court as applied to his now-discarded procedures. Rather, the Secretary insists that the "hearing on paper" afforded to disability beneficiaries by his new regulations is constitutionally sufficient. The Secretary does not contend that disability beneficiaries differ from welfare and old-age recipients with respect to their entitlement to benefits or the drastic consequences that may befall them if their benefits are erroneously discontinued. The only distinctions urged are that the evidence ordinarily adduced to support suspension and termination of disability benefits differs markedly from that relied upon to cut off welfare benefits and that an undue monetary and administrative burden would result if prior hearings were required. Neither distinction withstands analysis.

First. The Secretary points out that the decision to discontinue disability benefits is generally made upon the basis of wage reports from employers and reports of medical examinations. This evidence, in the Secretary's view, "is highly reliable and not of a type that draws into issue veracity or credibility." Brief 10.

"The basis upon which disability benefits are suspended or terminated thus differs significantly from that upon which the terminations of welfare benefits involved in [*Goldberg*] rested." *Id.*, at 25. Hence, the Secretary concludes, while procedural due process requires a pre-termination evidentiary hearing for welfare and old-age recipients, for disability beneficiaries a written presentation will suffice.

The Secretary seriously misconstrues the holding in *Goldberg*. The Court there said that "the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits." 397 U. S., at 267. The Secretary does not deny that due process safeguards fulfill the same function in disability cases. In *Goldberg*, the Court held that welfare recipients were entitled to hearings because decisions to discontinue benefits were challenged "as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Id.*, at 268. The Court expressly put aside consideration of situations "where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues." *Id.*, at 268 n. 15. However reliable the evidence upon which a disability determination is normally based, and however rarely it involves questions of credibility and veracity, it is plain that, as with welfare and old-age determinations, the determination that an individual is or is not "disabled" will frequently depend upon the resolution of factual issues and the application of legal rules to the facts found. It is precisely for that reason that a hearing must be held.

The Secretary, of course, recognizes that disability determinations often involve factual disputes. His new

procedures, as well as the post-termination procedures already available, presumably derive from that premise. The beneficiary may file a written response presenting rebuttal evidence before his benefits are suspended or terminated; after termination, he is entitled to reconsideration, based upon written submissions, and then a *de novo* evidentiary hearing, administrative appellate review of the hearing examiner's decision, and, finally, judicial review. Nevertheless, the Secretary insists that the decision to discontinue disability benefits differs from the decision to discontinue welfare benefits because the latter "may" be based upon "personal and social situations brought to the attention of the authorities by tips, rumor or gossip." Brief 25. Yet it is irrelevant how the matter is "brought to the attention of the authorities," whether "by tips, rumor or gossip" or otherwise. The question in a welfare determination, as in a disability determination, is simply whether the recipient continues to be eligible for benefits. Nor does the Secretary make clear the relevance of "personal and social situations." The Secretary does say that "[o]ne of the recipients in [*Goldberg*], for example, had been cut off because of her alleged failure to cooperate with welfare authorities in suing her estranged husband; payments to another were terminated because of alleged drug addiction." *Ibid.* The second recipient, however, was cut off because "he refused to accept counseling and rehabilitation." 397 U. S., at 256 n. 2. Consequently, both recipients lost their benefits for refusing to cooperate with the authorities. That, however, is no distinction from disability cases, for disability benefits will also be discontinued if the beneficiary refuses to cooperate.

To support the assertion that pre-termination hearings are required in welfare cases because "credibility and veracity" are in issue, the Secretary focuses upon

certain language in *Goldberg*. He first quotes the statement that "[p]articularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.*, at 269. Apart from the obvious fact that that was not an absolute statement intended to limit hearings solely to those instances, it was but one of three reasons given to demonstrate that written submissions are insufficient. The Court also said that written submissions "are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance" and that they "do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important." *Ibid.* Significantly, the Secretary does not deny that those reasons are as fully applicable to disability beneficiaries as to welfare recipients.

The Secretary also relies upon the statement, quoted in *Goldberg* from *Greene* v. *McElroy*, 360 U. S. 474, 496 (1959), that

> "where governmental action seriously injures an individual, and the reasonableness of the action depends on *fact findings*, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is *important* in the case of documentary evidence, it is even *more important* where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination." 397 U. S., at 270 (emphasis added).

Again, however, the statement hardly indicates that confrontation and cross-examination are available to welfare recipients only because "credibility and veracity" are in issue. An individual has those rights because *facts* are in issue, as the statement makes clear. Moreover, the Court introduced its quotation of that statement in *Goldberg* by pointing out that "[i]n almost every setting where important decisions turn on *questions of fact*, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.*, at 269 (emphasis added). And, even assuming the validity of the novel doctrine that confrontation and cross-examination are available solely for the purpose of testing "credibility and veracity," that would not justify depriving the disability beneficiary of "an effective opportunity to defend . . . by presenting his own arguments and evidence orally." *Id.*, at 268. Finally, I see no reason to suppose, nor does the Secretary suggest any, that the "credibility and veracity" of doctors and employers can never be in issue in a disability case. Indeed, the Secretary's new regulations indicate that they may. See Disability Ins. State Manual § 353.

The premise of the Secretary's entire argument is that disability benefits are discontinued "only on the basis of an objective consideration—that the previous disability has ceased—and that conclusion rests on reliable information." Brief 26. Whether or not the information is reliable, the premise is questionable. The Secretary himself emphasizes that disability determinations require "specialized medical and vocational evaluations" and not simply the acquisition of "medical and other relevant data." *Id.*, at 28. In any event, there are three grounds, pertinent here, upon which disability can be found to have ceased. None can fairly be characterized by the term "objective."

First, cessation of disability may be found if the beneficiary refuses to cooperate with the social security authorities. 20 CFR § 404.1539 (c); see Claims Manual § 6706 (e). That judgment, of course, could be wholly subjective, as the Secretary points out with reference to welfare cases.

Second, cessation may be found if the beneficiary "has regained his ability to engage in substantial gainful activity . . . as demonstrated by work activity." 20 CFR § 404.1539 (a)(2); see Claims Manual § 6706 (a). That decision does not, as the Secretary appears to assert, rest solely "upon regular reports made by [the beneficiary's] employers to the government." Brief 25. Rather, "the work performed" by the beneficiary "may demonstrate" that he is no longer disabled, but only if it "is both substantial and gainful." "Substantial work activity involves the performance of significant physical or mental duties, or a combination of both, productive in nature." A finding of "substantial gainful activity" depends upon the nature of the work performed, the adequacy of the performance, and the special conditions, if any, of the employment, as well as an evaluation of the time spent and the amount of money earned by the beneficiary. 20 CFR §§ 404.1532–404.1534.

Third, cessation of disability may be found if the evidence establishes medical recovery. 20 CFR § 404.1539 (a)(1); see Claims Manual § 6706 (c). That decision, of course, will be based upon medical examinations, but it does not follow that it is necessarily "objective." "The function of deciding whether or not an individual is under a disability is the responsibility of the Secretary," and a medical conclusion that the beneficiary is or is not disabled "shall not be determinative of the question." 20 CFR § 404.1526. The Secretary's decision that a beneficiary's impairment "is no longer of such severity as to prevent him from engaging

in any substantial gainful activity," 20 CFR § 404.1539 (a)(1), obviously depends upon more than an "objective" medical report, for the application of the legal standard necessarily requires the exercise of judgment. And, of course, multiple conflicting medical reports are "not uncommon." *Richardson* v. *Perales*, 402 U. S. 389, 399 (1971).

The Secretary's claim for "objectivity" is even less persuasive in the situation where a beneficiary's benefits are suspended. "Benefits are suspended when information is received which indicates that the individual may no longer be under a disability." Claims Manual § 6708. Here, by definition, there has been no determination that disability has ceased.

Finally, the post-termination reversal rate for disability determinations makes the asserted "objectivity" even more doubtful. According to the Secretary's figures for 1971, 37% of the requests for reconsideration resulted in reversal of the determination that disability had ceased. Moreover, 55% of the beneficiaries who exercised their right to a hearing won reversal. While, as the Secretary says, these figures may attest to the fairness of the system, *Richardson* v. *Perales*, *supra*, at 410, they also appear to confirm that the Court's reference in *Goldberg* to "the welfare bureaucracy's difficulties in reaching correct decisions on eligibility," 397 U. S., at 264 n. 12, is fully applicable to the administration of the disability program.

Second. The Secretary also contends that affording disability beneficiaries the opportunity to participate in evidentiary hearings before discontinuance of their benefits will result in great expense and a vast disruption of the administrative system. This justification for denial of pre-termination hearings was, of course, specifically rejected in *Goldberg*, 397 U. S., at 265–266, and

the Secretary offers no new considerations to support its acceptance here.

In *Goldberg*, the Court pointed out "that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U. S., at 264 (emphasis in original). That statement applies equally to eligible disability beneficiaries, for, as the District Court noted and the Secretary does not deny, "a disability beneficiary is by definition unable to engage in substantial gainful activity and he would, therefore, be liable to sustain grievous loss while awaiting the resolution of his claim." 321 F. Supp., at 386. In view of that result, the District Court concluded that the "fiscal and administrative expenses to the government, whatever their magnitude, are insufficient justification considering the crippling blow that could be dealt to an individual in these circumstances." *Ibid.* The Secretary's response is simply to stress the magnitude of the burden.

Here, as in *Goldberg*, "[t]he requirement of a prior hearing doubtless involves some greater expense." 397 U. S., at 266. The Secretary points out that current procedures include a two-step determination of disability: first by the state agency, after a district office of the Social Security Administration has conducted a disability investigation, and then, on review of the state agency's determination, by the Administration's Bureau of Disability Insurance, which is located in Baltimore, Maryland.[4] Thus, the Secretary says, a prior hearing "either would require the beneficiary to travel great distances or would necessitate that State or federal officials travel to the area in which the beneficiary resides,

[4] The Bureau cannot reverse a state agency's finding that disability has ceased, although it can require reconsideration by the agency. 42 U. S. C. § 421 (c); 20 CFR § 404.1526 (c); Claims Manual § 6701 (c); see Brief for the Secretary 11–12, 17.

neither of which is practical." Brief 28–29. "Nor could the decision-making function be turned over to the Administration's district offices, which are located conveniently to the beneficiaries, without staffing them with individuals qualified to make the necessary medical and vocational judgment." *Id.*, at 29. Hence, the Secretary concludes, prior hearings "would require massive restructuring of the existing administrative adjudicative process." *Id.*, at 27.

Except for bald assertion, the Secretary offers nothing to indicate that any great burden upon the system would result if the state agencies conducted the hearings. Moreover, the Secretary omits even to mention the existence of the current post-termination hearing procedures. See 20 CFR §§ 404.917–404.941. It is reasonable to assume that the only "restructuring" necessary would be a change in the timing of the hearings. That was apparently the method by which the Secretary required the States to comply with *Goldberg* in the administration of various other social security programs, see 45 CFR § 205.10, 36 Fed. Reg. 3034–3035, and it would seem to be an equally available response here. While the administration of the disability program to provide prior hearings may involve "some greater expense," as the Court noted in *Goldberg*, 397 U. S., at 266, that expense should not be exaggerated in order to deprive disability beneficiaries of their right to "rudimentary due process," *id.*, at 267.

The Secretary also claims that the requirement of prior hearings "would result in losses to the Social Security Trust Fund of nearly $16 million per year for disability cases and still greater sums when all Title II programs are considered." Brief 10. This conclusion does not follow from the facts the Secretary presents.

As to the disability program, the Secretary says that in 1971 there were 38,000 determinations that disability

had ceased and that the average monthly benefit in those cases was $207. If, to provide prior hearings, terminations were delayed for two months, the Secretary says, the cost in benefits paid pending the hearings would approach $16 million. It is immediately apparent that this figure is grossly inflated.

First, this figure depends upon the unwarranted assumption that all beneficiaries will demand a prior hearing. The Secretary suggests no reason to suppose that would happen. In fact, while there were 38,000 disability cessations in 1971, there were only 10,941 requests for reconsideration, and although 6,885 cessations were affirmed on reconsideration, there were only 2,330 requests for hearings. These post-termination procedures, of course, were utilized by beneficiaries who could not present their views before termination. Under the new regulations, affording notice and the opportunity to respond in writing before termination, it may well be that even fewer beneficiaries will demand hearings. In any event, experience in the welfare area has not demonstrated that recipients abuse their right to pre-termination hearings, and the Secretary does not claim that disability beneficiaries will do so.

Second, the $16 million figure requires not only that all 38,000 beneficiaries request prior hearings, but also that they all lose. Yet, as noted above, 37% of the reconsiderations on written submissions and 55% of the post-termination hearings in 1971 resulted in reversal. The Secretary does not claim, nor is it conceivable, that in every case a prior hearing would uphold the initial determination that disability had ceased.

Third, not only must every beneficiary request a prior hearing and every hearing affirm cessation of disability, it must also be true, to reach the $16 million figure, that the Secretary will be unable to recover any of the benefits paid to beneficiaries pending the hearings. That resu

is unlikely. Section 204 (a)(1) of the Act, 42 U. S. C. § 404 (a)(1); see 20 CFR §§ 404.501–404.502, directs the Secretary, if he finds that there has been an overpayment, to require a refund from the beneficiary or to decrease any future benefits to which he may be entitled. Thus, if the beneficiary is not "disabled," he presumably can engage in "substantial gainful activity," and the Secretary may well secure a refund. If, on the other hand, the case is a close one and the beneficiary is later found to be "disabled" again, the Secretary may reduce his benefits. Furthermore, § 204 (b), 42 U. S. C. § 404 (b); see 20 CFR §§ 404.506–404.509, directs the Secretary not to require a refund or decrease benefits if the beneficiary "is without fault" and a refund or decrease "would defeat the purpose of" the Act or "would be against equity and good conscience." The Secretary's duty to waive claims for excess payments may well apply in many termination cases, particularly where the beneficiary is judgment proof. See 20 CFR § 404.508. Obviously, there is no loss to the social security fund if benefits paid to an ineligible beneficiary pending a hearing are subject to statutory waiver.

Fourth, the $16 million figure depends upon the stated premise that the requirement of a hearing would cause a two-month delay in the termination of benefits. The Secretary does not explain why he chose that time period. Under the new regulations, a beneficiary receives notice of the proposed discontinuance, is informed of the information upon which it is based, and is given the opportunity to submit a written response presenting rebuttal evidence. Only then is the disability determination made. It is difficult to believe that it would require another two months just to provide a hearing.

Finally, under § 223 (a)(1) of the Act, 42 U. S. C. § 423 (a)(1); see Claims Manual § 6707, benefits must be paid for two months after the month in which disa-

bility ceases. The $16 million figure depends upon the unwarranted assumption that all terminations occur at least two months after disability is found to have ceased. In this case, for example, the state agency determined that plaintiff Atkins' disability ceased in January. The Bureau of Disability Insurance approved that determination and on February 3 informed Atkins that his benefits would be terminated at the end of March. Thus, even assuming a two-month delay for a hearing, there would be no cost whatever to the trust fund.

Viewing Title II programs as a whole, the Secretary points out that there were nearly three million terminations of benefits in 1969. The vast majority of these terminations were for death, attainment of a certain age, and so forth, but the Secretary asserts that apart from those cases there were 515,189 terminations that would have been affected by the requirement of a prior hearing. That number, however, includes terminations based upon a student's leaving school, a change in a beneficiary's marital status, and the death or adoption of a child. Without those cases, the number drops to 186,035. Moreover, even this number includes disability terminations and the terminations of dependents based thereon. Putting aside those cases, the total appears to be somewhat closer to 100,000. While that is a substantial number of terminations, the Secretary does not indicate what issues are involved in making the decisions. As noted above, prior evidentiary hearings are necessary in disability cases because factual disputes exist. They may exist to a far lesser extent in other programs. Moreover, to whatever extent they do exist, the objections to the Secretary's inflated cost figure for disability terminations would seem to apply equally to nondisability terminations. In any event, the Secretary has simply provided the bare number of terminations, with no further information, and it

is inappropriate, if not impossible, to decide what effect requiring prior hearings in disability cases will have on nondisability cases.

I do not deny that prior hearings will entail some additional administrative burdens and expense. Administrative fairness usually does. But the Secretary "is not without weapons to minimize these increased costs." *Goldberg* v. *Kelly*, 397 U. S., at 266. Despite the Secretary's protestations to the contrary, I believe that in the disability, as in the welfare, area "[m]uch of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pretermination hearings and by skillful use of personnel and facilities." *Ibid.* The Court's conclusion on this point in *Goldberg* is fully applicable here:

> "Indeed, the very provision for a post-termination evidentiary hearing . . . is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." *Ibid.*

My answers to the Secretary's contentions are also the reasons I disagree with the majority of the District Court and agree with the dissenting judge. I would therefore vacate the judgment of the District Court and remand with direction to enter a new judgment requiring that disability benefits not be discontinued until the beneficiary has been afforded procedural due process in the form mandated by *Goldberg* with respect to discontinuance of welfare and old-age benefits.